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THE

LEGAL OBSERVER.

OR

JOURNAL OF JURISPRUDENCE.

PUBLISHED WEEKLY.

MAY TO OCTOBER, 1831,

INCLUSIVE.

——"Quod magis ad nos
Pertinet, et nescire malum est, agitamus."

HORAT.

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ERRATA.

Page 219. col. 1. line 47. from top, for 55 Geo. 5. read 59.
341. col. 1. line 5. from bottom, for " defendant" read " plaintiff."
341. col. 2. line 2. from top, for " plaintiff" read " defendant."
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PREFACE.

A Second Volume of our Work is now presented to our Readers, and its last Number terminates our First Year. The anniversary of our birth-day is at hand: we have survived the most critical period in the existence of a periodical, and we look forward with confidence to a long and active life. If it were the fashion, as in former times, to print by way of Introduction the *encomia* and recommendations of our productions which we have received, we should not have much difficulty in finding them. Poesy has stooped in her flight to compliment us, and of "Admirers" and "Philo-Legal Observers" we boast not a few. But "our modesty is equal to our merit;" and we should have made no allusion to them, but that we are anxious to take this opportunity of making a gentle expostulation with another class of our Subscribers, whom we find it more difficult to satisfy; and in doing so, we could not, in gratitude, refrain from thanking the friends who have given us their entire support—who have constantly cheered us on, and have lightened many an anxious and difficult hour devoted to our weekly labours.

The latter class, to whom we now wish to say a few words, differs in some respects from the former. We count amongst it, indeed, some of our most constant and eager supporters; but they puzzle us a little at times. They write to us approving warmly of certain portions of our work; but hinting that other parts are not so pleasing to them. They are quite delighted with this article, but cannot see the reason of inserting that one. They applaud the productions of one contributor; but are sceptical of the benefit to be derived from those of another. "They doat, yet doubt; suspect, yet strongly love." Now, if all this class of correspondents would only be of one way of thinking, our course would be easy. The obnoxious subject should never again be touched upon. The unhappy contributor would, of course, receive a letter, stating our respect for his talents and virtues, deploring the bad taste of our readers, but informing him that "henceforth he was no officer of ours." But here comes our difficulty. The opinions, tastes, and wishes of our Subscribers on this point are as different as North from South. These paper remonstrances come from every point of the compass. One is anxious for this sort of information; another cannot see its utility. The very article that we have written, or caused to be written, to satisfy the wishes of one friend, exposes us to the censure of another. We have now before us a heap of letters on this very subject, the writers of which all tender us their advice and assistance. "B. I." considers our Reports of Cases "models in their way; short, and to the point," but recommends us, for the future, to omit all the lighter articles. An alliterative correspondent, signing himself T. T. T., on the other hand, declares that we should be more literary and sprightly:—"Your work should contain something lively in every number. The article on 'Harlequin Chancellor' shows that you can be so: keep it up." A letter signed with the fearful name of Scorpion requires that we should follow up our attacks upon legal sinecurists more vigorously, and hints, that if we were prosecuted for a libel, it would not do us "*much* harm." Another friend, calling himself Senex, cautions us against any allusion to public characters; and after praising our excellent contributor, the author of the Letters to the Lord Chancellor, recommends him to be more

sparing in his powers of satire and invective. "A Special Pleader" is for having less space given to points in Conveyancing; whereas I. L., of Nottingham, asserts that part of the work to be "the most useful of all, particularly in the country."

This is only a specimen of what we go through weekly; so that, if we are to attend to all the suggestions of our correspondents, our weekly sheet would resemble a French newspaper during the censorship,—two thirds of it blank paper. Now, we have mentioned this, not with the wish of discouraging our friends from giving us their opinions; on the contrary, we are always pleased to receive any letter, however it may differ from our own sentiments. We merely mention it to account for our not being able always to attend to the suggestions which are made to us. We have alluded to the subject for the purpose of assuring our readers that we have many different tastes to please; we must satisfy all classes of the Profession, and not leave the general reader entirely unattended to: and we must do all this in a very confined space. We give our assurance, however, that we are zealous in the cause; that our best energies and talents, and those of many others, are devoted to the work, and that the interests and benefit of our Profession are nearest to our hearts. We are also of opinion, that no Number of our Work can be produced in which the most fastidious reader will not find something that will either please or instruct him, and recompense him for the expense of being one of our supporters. Finally, therefore, we beg our friends to consider what we have said, and to believe that, like the Spectator, "if we are occasionally dull, they may be sure that there is a reason for it."

A word, now, upon our past and our future labours. Since our publication, no change in the laws has either taken place, or been projected, that we have not noticed, developed, and rendered clear to the student and to the practitioner. We shall continue this course, being satisfied of its utility. Indeed, it appears to us, that the changes which are constantly making in all parts of the law could hardly be kept in sight and remembered without the help of some publication similar to our own; and our difficulty hitherto has been to select from the abundance of the materials offered to us what appeared most interesting and valuable.

The other two portions of the work have enabled us to render our original design complete. The MONTHLY RECORD supplies the professional reader with all that information which was before scattered through a hundred distinct and frequently inaccessible volumes. He will find it here collected and arranged in an accessible form, and at a price lower than any one of its items of intelligence would have amounted to on the terms at which it has before been presented to the public.

The QUARTERLY DIGEST has received the approbation to which its utility entitles it. The advantage of referring to the latest cases on every subject is too obvious to require comment.

Having, as is usual, devoted our Preface to ourselves, we have still one other thing which we think it necessary to say. This work is conducted by many, not by one. Wherever we have supposed that we could acquire the information and assistance which we wanted, most readily and effectually, there have we repaired and obtained it; we think that this course has been the right one: and we now again take leave of our readers, with our hearty thanks for all their assistance and indulgence.

Trinity Vacation,
October 27.

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The Legal Observer.

VOL. II. SATURDAY, MAY 7. 1831. No. XXVIII.

——— "Quod magis ad nos
Pertinet, et nescire malum est, agitamus."
HORAT.

JUDICIAL CHARACTERS. — No. IV.

SIR ANTHONY HART.

SIR Anthony Hart has now retired from office, and it becomes our duty to enquire into his judicial character. His life has not been eventful, and that part of it spent on the bench has been short; our task, therefore, will not be so arduous as in former instances.

Sir Anthony Hart was born in the island of Antigua, in the West Indies, about the year 1760, and is now therefore past seventy. He came early in life to England, and after passing some years at school, went into the chambers of Mr. Hollist, the well-known Chancery barrister, not thinking it necessary to spend any further time at a university. He remained some time with Mr. Hollist, diligently engaged in the study of his profession, and then prepared to complete his original intention of returning to the West Indies, there to pursue his professional career. On taking leave of Mr. Hollist for this purpose, that gentleman strongly opposed his plan; assured him that he was well qualified for success in this country; and added, that if he could be of any service to him, he might command it.

Thus encouraged, young Hart resolved to remain in England, and venture upon that life in which so many have failed, and success is attained with such difficulty. By the means of Mr. Hollist's recommendation, he soon obtained business, which his own abilities secured to him; and on Mr. Hollist's retirement from the profession, he succeeded to the greater part of his extensive practice. From this period up to the year 1827, he was in constant employment at the Chancery bar; when he left it, he had outlived the last of those with whom he began his career and fought his earliest battles.

His great characteristic as an advocate was his prudence and sagacity. In his hands his client was always safe. If his triumphs were not very brilliant, they were certain: he chose rather to proceed step by step to the point to which he had proposed to himself to arrive, than by a more rapid movement to risk its attainment. His mode of conducting a cause was slow and methodical. He could never be moved from his course. He was never excursive or entertaining: eloquence or declamation were utterly alien to his purpose; and although he sometimes ventured upon a little jocularity, it was of the soberest nature.

In May, 1827, he was made Vice-Chancellor, but held that office only six months; being, in October, 1827, intrusted with the great seal of Ireland, and made Lord Chancellor. While Vice-Chancellor, we had many opportunities of observing his judicial qualifications; and we think that he would not have been able to have performed the duties of that office very effectually. His slowness at the bar he retained on the bench. We have heard him enquire with great minuteness into the particular circumstances of a motion of course. He could not easily bring his mind to a conclusion. He was, indeed, of the olden school of lawyers, and we think he could never have discharged the increasing and laborious duties of Vice-Chancellor with much benefit to the country.* We rejoiced, therefore, on hearing that he was

* At the time that Mr. Hart was appointed Vice-Chancellor, there were 270 causes and further directions set down before him. He decided or disposed of about sixty causes and further directions in the space of about three months. See Cooper's Lettres sur la Cour de la Chancellerie, p. 41. 2d edit. It is clear, therefore, that, if he had not changed his manner of despatching business, he could not have performed the duties of Vice-Chancellor.

created Chancellor of Ireland. He was well suited for the situation. He was fully able to despatch all the business before him, and we understand there have been very few appeals from his decisions.

Few judges have been more esteemed in private than Sir Anthony Hart. His manners on the bench were full of kindness and amenity. It was not in his nature to give any one offence; and we can well understand the universal regret which the resignation of his office occasioned in Ireland. We are told that it was a highly interesting, not to say affecting, scene. No pains were taken on either side to conceal the reluctance which was felt to part, and it was far more than a mere formal farewell.*

His judgments as Vice-Chancellor are reported in the first and second volumes of Simons, and as Chancellor of Ireland, in Beattie's Reports. We shall give a short specimen of one of them delivered by him as Vice-Chancellor; it is not very remarkable, but we have been unable to find any other which is more so. They display, in common with every judgment which he delivered, great care and attention, extensive experience and learning; and doubtless his decisions will always be esteemed of importance.

The case of *Bale* v. *Bale*, 2 Sim. 35., will furnish our example of his decisions as Vice-Chancellor. The question was, whether the Court had jurisdiction to deprive a father, though living in adultery, of the custody of his children, unless he brings the child in contact with the woman with whom he is so living.

"The *Vice-Chancellor* said—This court has nothing to do with the father's adultery, unless the father brings the child into contact with the woman. All the cases upon this subject go upon that distinction, when adultery is the ground of a petition for depriving the father of his common-law right over the custody of his children.

"Some conduct, on the part of the father, with reference to the management and education of the children, must be shown, to warrant an interference with his legal right; and I am bound to say that, in this case, there does not appear to me to be sufficient to deprive the father of his common-law right to the care and custody of his child. It resolves itself into a case for authorities; and I must consider what has been looked upon as the law on this point. I do not know that I have any authority to interfere. I do not know of any one case similar to this, which would authorise my making the order sought, in either alternative. If any could be found, I would most gladly adopt it; for, in a moral point of view, I know of no act more harsh or cruel than depriving the mother of proper intercourse with her child. I was myself counsel in two cases, in which Lord Eldon refused petitions precisely similar. *Smith* v. *Smith*, one of them, was precisely similar in its facts to the present case, except that the father's object there was to compel the mother, by such means as those now complained of, to give up to him some property which was settled to her separate use. My course of argument in that case was, that as the law allowed the mothers of bastards to retain possession of their children till the age of seven, *à fortiori* must the law allow the care of legitimate children to be vested in the mother. The child in that case was under seven. The Lord Chancellor, however, refused the order; and before any further proceedings were had, either the mother or the child's death determined the question. This was a very strong case; yet the Lord Chancellor held that the Court had no jurisdiction. The other case was *Gallini* v. *Gallini*. There the question was, on the ground of the father's religious principles. He was a catholic; but the Lord Chancellor refused, for such a reason, to take away the children from the father. We then prayed that access might be allowed to the mother; but the Lord Chancellor, I am nearly certain, refused the order."

The judgments as Lord Chancellor of Ireland are well worthy of the attention of the reader. They frequently display all the best qualities of Lord Eldon's best judgments. But after examining them with much attention, we have been unable to find any one which illustrates the peculiar quality of the learned judge. We have therefore not made any extract from them.

* See the address, Monthly Record, p. 7.

COMMON FORMS FOR PARLIAMENTARY CANDIDATES.

To the Editor of the Legal Observer.

MR. EDITOR,

ALLOW me, through your excellent and widely circulated Journal, to solicit the attention of all parliamentary candidates, and in particular of the Parliamentary Candidate Society. I have prepared with great care and trouble, and have now on hand, a large assortment of addresses to electors, speeches to ditto, election placards, songs, squibs, and pasquinades of all descriptions. They are intended to suit all parties and all sorts of opinions, from the tory, who considers that Old Sarum is the "decus et tutamen" of the British constitution, to the radical, who declares that the vote of a potwalloper is the perfection of human reason. I have them of all shapes, colours, and sizes; and I shall proceed to give you a few samples of my stock.

But first let me caution (and I have had a long experience in the matter) the youth-

ful candidate from venturing out of the beaten track in his addresses or speeches. There are certain well known terms and forms, which every one understands, and which, having decided advantages, should never be departed from. I admit that a trifling variation may occasionally be made; but the greatest care is necessary in attempting it. The great art of the candidate is to write and talk without committing himself; and if he will attend to my directions, I will enable him to do so.

Having given this hint, I will now proceed to mention some of my common forms, which, it is to be recollected, are equally applicable to speeches on the hustings, on wagons, on the balconies of inns, &c., as to addresses and placards. And, first, let all candidates take this general recommendation. As they will shortly, if they follow my directions, find themselves in the House of Commons, they should, at the earliest period of their election, begin to talk the parliamentary language; which is, as every one knows, quite peculiar to the honourable house. Thus, the candidate should call his voters, be they greasy artificers, or what they may, his "honourable friends," his brother, an ensign in a marching regiment, (whom he should bring down to fight his opponent, if necessary,) "his gallant relation." "He must have yet to learn," and "must be free to confess," &c. &c. In short, he must consider himself as actually elected, and speak accordingly.

Furnished with this stock of expressions, he must then go a little into details, which will, of course, vary with the politics which he professes. Let him, therefore, attend to the following rules:—

TO THE ULTRA TORY.

The sheet anchor of the ultra tory is "the constitution." If ever he is at a loss for a word or a sentence, let him think of the following:—"I am free to confess that I cannot think that our constitution is to be altered with impunity." "Our glorious ancestors have fought and bled for our present institutions; and I will not consent to alter one jot of them. I have yet to learn that we can find a better." "I am satisfied with the present blessings we enjoy; and I do not choose to hazard them by any revolutionary experiments. I would rather keep the ills we have, than fly to others that I know not of." Or, if he is desirous of making a great impression, let him not be sparing of expressions of this nature: "revolutionary mania," "revolutionary fever, pestilence, measures, ministers, &c., Robespierre, scaffold, guillotine;" but always ending with "British constitution unchanged and inviolate, for which my gallant relative has bled, and for which I would lay down my life!"

TO THE MODERATE TORY.

The great word of the moderate tory is "moderation." He must be willing to admit that some change may be necessary in our present institutions, but he must earnestly deprecate all violent, sudden, and hasty movements. He must be willing to follow, but not to lead, in the cause of reform. He must see-saw a little. He must declare his dislike to African slavery, but protest against any destruction of vested rights in property. He must resolve that the whole pension list should be reconsidered, but maintain that the government cannot be carried on without pensions. He also must occasionally talk of the constitution, and the wisdom of our ancestors; but must allow that some part of the former is fallen into decay, and that the latter is not absolute. He must admit that the country is heavily taxed; but must be of opinion that the existing establishments are absolutely necessary to the dignity of the crown and the stability of the country at home and abroad.

TO THE WHIG.

The candidate who starts on whig principles has an easy task. He must dilate upon "trial by jury," and "the liberty of the press, which must be the air he breathes, and without which he dies." He must also espouse "the cause of liberty all over the world." All grievances in foreign countries should be exclaimed against; and the more remote the country, the better for his purpose. "The heroic struggle for freedom in Poland, in Lithuania, in Volhynia," must be rung in the ears of the voters. And if he is ever at a loss for a sentence, he has one ready made in "the cause for which Hampden died in the field and Sydney bled on the scaffold."

TO THE REFORMER.

The catchword of the reformer will, of course, be "reform;" reform in our state, in our church, in our laws, &c. He must declare "that the time is come when mankind will no longer permit the few to think for the many;" that "the march of mind has broken the bonds of ignorance;" that "man now walks abroad in the consciousness of his strength, demanding to be heard, and not brooking a denial." He "must be free to confess that he cannot, for his part, admit the boasted wisdom of our ancestors." He must be permitted to think for himself;

and he "must have yet to learn that they would not have acted as he has done, if they had lived at the present time." If he is pushed very hard, he must declare that he sees no benefit in the preservation of a church establishment. He must consider all soldiers as slaves, and all lawyers as rogues. He must boldly assert that the whole of the aristocracy is fed out of the pockets of the people. He must agree that the present monarch is highly popular; but regret that he puts the country to so much expense. He must finally declare that he will devote himself to the cause of the people; that he will be Argus-eyed, and Briareus-handed, in their service; that he considers the meanest of his voters his brother; and that he would shed the last drop of his blood to defend his interests.

These common forms should make the substance of all election speeches. They have no meaning; and cannot in any way commit the candidate; and the less a candidate commits himself, the better he will find it, should he be elected. If he take my advice, he will never go farther into details; they will merely embarrass him in after-life.

I do not mean to say, however, that he is not occasionally to introduce some other topic, applicable to the special circumstances of the times, or the place for which he stands, or the interest which returns him, or his own peculiar situation. Thus, if he stand on the corporation interest, he must, of course, speak of "the ancient, worthy, and venerable corporation;" he must also say, that the mayor "unites the most enlightened understanding with the most dignified conduct, and the most gentlemanly manners;" that the aldermen "are blessed with the hearts of true Englishmen, directed by intellects the brightest, clearest, and most penetrating;" that the constables "are wonderful examples of persons uniting vigour in the execution and moderation in the discharge of their important offices;" that "the churchwardens," &c. In short, it would be ungrateful and unpolite not to praise every member of the corporation.

Thus, also, if the candidate is the son of any well known man of wealth, the inventor of a patent medicine, or lottery contractor, for instance, as his name will in itself assure the electors that he is competent to satisfy all the wishes of their hearts, it will be proper to allude to it. Thus, he may say, "The illustrious name of De Velnos, which I bear, is a sufficient guarantee to you of the principles I profess, and of the means I have of supporting them;" or "the descendant of the immortal inventor of the Balm of Rakasiri, I venture to address you." These words will speak volumes to the electors; and will immediately make the person, who is fortunate enough to be so well connected, the popular candidate.

I have now, sir, given you a sufficient sample of my stock; but I may be induced to give a further one, should I find my present advertisement attended with success.

I am, Sir,
Your obedient Servant,
X. Y. Z.

LAW REPORTING.

Reports of Cases argued and determined in the Court of King's Bench in Banc, after Trinity and in Michaelmas Terms in the 11 *George* 4. *and* 1 *William* 4. 1830. By Richard V. Barnewall and John Leycester Adolphus, Esquires, Barristers at Law. Saunders and Benning.

These Reports appear to us to be well executed. The former series, by Messrs. Barnewall and Creswell, were open to most of the objections which we have made to the modern system of reporting; but we are happy to perceive a decided improvement in the present series.

It is proper, however, to notice, that this number is not free from objection. We can see no advantage in reporting at length cases on the construction of turnpike acts, highway acts, parish acts, &c., such as *Allsworth* v. *Pott*, p. 302., *Rex* v. *Mayor, &c. of Norwich*, p. 311., and other cases in this Number. They settle no general principles; they are of very little service, except to the parties concerned, and should therefore, in our opinion, not be fully reported. It is also surprising how frequently the marginal notes of the report are incorrect in their statements, being either unsatisfactory, or untechnically worded. We shall mention some of the important cases.

The first decision which we shall notice is that of *Hancock* v. *Podmore*, 260., where the executor had expended the sum of 79*l.* in the funeral expenses of a captain on half-pay. This was thought too much by the Court as against a creditor. Mr. Justice *Bayley* says, —

"Issue was taken in this case on the plea of *plene administravit*, and it was proved that assets, to the amount of 129*l.*, had come to the hands of the defendant as executrix, and that she had paid 55*l.* for probate duty, and 79*l.* for funeral expenses. The learned Judge expressed an opinion that those two sums were sufficient to cover the assets proved, and that the defendant

might lawfully apply 79*l.* in payment of funeral expenses, even against a creditor. The counsel for the plaintiff, upon hearing that opinion, elected to be nonsuited without going to the jury. We all think that 79*l.* was too large a sum to be allowed in the present case. The rule, as against a creditor, is, that no more shall be allowed for the funeral than is necessary. In considering what is necessary, regard must, undoubtedly, be had to the degree and condition in life of the party. In *Shelly's case* (1 Salk. 296.), Lord Holt says that 'for strictness, no funeral expenses are allowable against a creditor, except for the coffin, ringing the bell, parson, clerk, and bearers' fees, but not for pall or ornaments.' In *Stag* v. *Punter* (3 Atk. 119.), Lord Hardwicke says, 'When a person dies insolvent, the rule is, that no more shall be allowed for funeral than is necessary; at first 40*s.*, then 5*l.*, and at last 10*l.*' The last mentioned sum may, perhaps, at the present day, be less than what should reasonably be allowed for a person of condition; but we all think that 79*l.* is a larger sum than ought to be allowed as against a creditor for the funeral of a person of the degree and condition of life of this testator. There ought, therefore, to be a new trial, unless the defendant will consent to let the plaintiff enter up judgment *de bonis testatoris*, for such a sum as, after allowing 20*l.* for funeral expenses, and 5*l.* for probate duty, would remain in her hands. But as the plaintiff's counsel elected to be nonsuited, without desiring that any point should be submitted to the jury, the rule must be made absolute, without costs. The plaintiff will be entitled to judgment for the residue of the debt *de bonis testatoris quando acciderint*, according to the note to *Hancock* v. *Proud* (1 Saund. 336)."

The case of *De la Vega* v. *Vianna*, p. 284., is of some importance in settling the rights of foreigners, and we shall give it at length. It is ably reported.

"The plaintiff, a Spaniard, and the defendant, a Portuguese, had some mercantile transactions together in Portugal in 1816, by which, as the plaintiff alleged, the defendant became indebted to him, while both were resident in that country. They afterwards came to England, and the plaintiff there caused the defendant to be arrested for the debt stated to have accrued in Portugal. During the term, *Denman* obtained a rule to show cause why the defendant should not be discharged out of custody, on filing common bail. In supporting this rule, the affidavit of a Portuguese *avogado* or barrister was put in, stating that by the law of Portugal the person of the debtor was not, and had not been since the year 1774, liable to arrest at the suit of the creditor, either before or after trial or decision on the creditor's demand. *Campbell*, on a subsequent day, showed cause. The defendant claims to be discharged from arrest in this country, because he would not have been liable to such proceeding in the country where the debt accrued. This is no ground of discharge. When a suit is instituted between parties in one country on a contract made in another, the construction of the contract is governed by the law of the country where it was entered into; but in pursuing the remedy, the *lex domicilii* must be consulted. This principle is supported by the late case of the *British Linen Company* v. *Drummond* (E. T. 11 Geo. 4.), where an action was brought in this court on a written engagement entered into in Scotland; and although by the law of this country the statute of limitations had attached, it was contended that the Scotch law must prevail, which would have allowed forty years for commencing the suit. But this court thought the case must be governed by the law of the country in which the action was brought. The rule applies with additional force in a question as to process. In *Talleyrand* v. *Boulanger* (3 Ves. jun. 447.), the opinion of Lord Loughborough, which may be urged on the other side, was formed partly on a supposed decision in the Common Pleas; and the judgment was influenced by an equitable consideration of the bad faith and misconduct of the plaintiff in a transaction subsequent to the original engagement. In *Milan* v. *The Duke de Fitzjames* (1 B. & P. 138.), the case in the Common Pleas which had been mentioned before Lord Loughborough was adverted to, but the defendant's counsel admitted that he had not been able to find any account of it. It is true that in *Milan* v. *The Duke de Fitzjames* the Court of Common Pleas decided that a party could not be held to bail in this country on an instrument executed in France, which would not have rendered his person liable there. But *Heath* J. differed from the other two judges, and took this distinction:—'In *construing* contracts, we must be governed by the laws of the country in which they are made, for all contracts have a reference to such laws. But when we come to remedies, it is another thing; they must be pursued by the means which the law points out where the party resides; the laws of the country where the contract was made can only have a reference to the nature of the contract, not to the mode of enforcing it.' This is consistent with the doctrines laid down by Huber, Prælect. pars ii. lib. i. (de conflictu legum) tit. 3. sect. 7., and Voet, Comment. ad Pandect. lib. i. tit. 8. sect. 30., and lib. xliv. tit. 3. sect. 12. The opinion of Mr. Justice *Heath* was supported by Lord Ellenborough in *Imlay* v. *Ellefsen* (2 East, 453.), Lord Eldon, in *Flack* v. *Holm* (1 Jac. & W. 405.), referred to *Talleyrand* v. *Boulanger* for the purpose of drawing the attention of the parties to the law there laid down, but without any expression of concurrence. *Tenon* v. *Mars* (8 B. & C. 638.) was decided on another ground. — *Denman, contrà.* The fiction upon which our mesne process is founded ought not to be carried to the extent of abolishing the comity of nations, and obstructing the recognition of each other's laws. Lord Loughborough, in *Talleyrand* v. *Boulanger*, gives a direct opinion on the point now before the court. 'If it stood upon the original contract,' he says, (which was that made in France,) 'it would be contrary to all the principles which guide the courts of one country in deciding upon contracts made in another, to give a greater effect to the contract than it would have by the laws of the country where it took place.' *Milan* v. *The Duke de Fitzjames* is a direct authority on the same side, and cannot be said to have been overruled by the dissent which Lord Ellenborough intimated in the course of the ar-

gument in *Imlay* v. *Ellefsen*. The point was not discussed on that occasion, Mr. Erskine having other grounds on which he placed more reliance. *Flack* v. *Holm*, and *Tenon* v. *Mars*, are, at least, no authority against this application. The defendant, if discharged in person, is still answerable by his property.

"Lord *Tenterden* C. J. delivered the judgment of the Court. This was an application to discharge the defendant, who had been arrested upon mesne process, out of custody on filing common bail. The plaintiff and defendant were both foreigners; the debt was contracted in Portugal; and it appears that, by the law of that country, the defendant would not have been liable to arrest. It is contended on the authority of *Milan* v. *The Duke de Fitzjames*, that he is entitled to the relief now sought. We are, however, of opinion that he is not. In the case just mentioned, the distinction taken by Mr. Justice Heath, who differed from the other judges, was, that in construing contracts, the law of the country in which they are made must govern, but that the remedy upon them must be pursued by such means as the law points out where the parties reside. This doctrine is said to correspond with the opinions of Huber and Voet. I have not had an opportunity of looking into those authorities, but we think, on consideration of the present case, that the distinction laid down by Mr. Justice Heath ought to prevail. A person suing in this country must take the law as he finds it; he cannot, by virtue of any regulation in his own country, enjoy greater advantages than other suitors here, and he ought not therefore to be deprived of any superior advantage which the law of this country may confer. He is to have the same rights which all the subjects of this kingdom are entitled to. The rule must be discharged."

The case of *Coren* v. *Sharpe*, p. 386., decides rather an interesting point. An attorney, having been disqualified from practising by not taking out a certificate, obtains a rule of Court for his readmission, but he may still maintain an action for business done after he obtained the rule, but before he caused his readmission to be entered at the Master's office.

There are few subjects of such practical annoyance as what are, and what are not, fixtures. The case of *Lyde* v. *Russell*, p. 394., is an important decision on this subject. We shall quote Lord Tenterden's judgment.

"We are of opinion that there should be no rule in this case. The question arose as to the right of a tenant to certain bells which he had put up in, and annexed to a house so as to make them fixtures. He did not take them away during his term, and the question is, whether, they having been afterwards severed from the freehold, and become goods and chattels, he can now maintain trover. In a very excellent treatise on the law of fixtures, by Mr. Amos and Mr. Ferard (p. 87.), it is laid down, that a tenant must use his privilege in removing fixtures *during the continuance of his term*, for if he forbear to do so within this period, the law presumes that he voluntarily relinquishes his claim in favour of his landlord: and the following authorities are cited. "In the Year-book, 20 Hen. 7. c. 13., the Court speaking of the furnaces set up by a lessee for years say, '*During his term* he may remove them; but if he permit them to remain fixed to the soil *after* the end of his term, then they *belong* to the lessor.' And the dictum of Kingsmill J. in 21 Hen. 7. c. 26, is to the same effect. In like manner, in Poole's case (1 Salk. 368.), it was said by Lord Holt that, '*during the term* the soap-boiler might well remove the vats, but, after the term, they became a gift in law to him in reversion, and are not removeable.'" According to these authorities, then, the property in fixtures which would be in the tenant if he removed them during the term, vests in the landlord on the determination of the term. That being so, the only remaining question is, whether any thing said or done by the defendant had the effect of revesting the property in the bells in the plaintiff? It appears that the bells had been taken down by the defendant, and that he, on the application of the plaintiff, had consented to give them up if the plaintiff would pay 6*l.* rent. The only effect of that is, that if he would pay that sum he would not dispute with him about the bells: it does not amount to a recognition of his right to take them away.—Rule refused."

HINTS TO PRACTITIONERS.

No. I.

One of the most important duties of a solicitor is that of properly receiving his clients; collecting from them sufficient information to enable him to give them the advice they seek, and making them fully comprehend the advice he gives them. In order to qualify himself to give advice, it is absolutely necessary that he should investigate the rules or principles of law so as to guide his judgment, and read the reports so soon as they are published. He will find that it is by the general rules and principles of law that he must act, for it is almost impossible to find any case alike in circumstances; and the test of a good lawyer or solicitor is, that he can apply those rules and principles to the cases brought under his consideration. These rules and principles may be gathered from the decisions of the courts, though the cases which gave rise to those decisions may or may not be exactly similar to the cases under the consideration of the solicitor.

Most clients wish to go through a long story in the first instance, and to state their difficulties and questions at the *close* of their story. This is so frequently and usually the case, that it will require some

delicacy and humouring to induce the client to *begin* with his difficulties and questions. The advantage of acquiring at the commencement a knowledge of what are the difficulties and questions is, that the attention of the solicitor is then drawn to them while the client is narrating the particulars of his case, so that those parts of the narrative which bear upon the questions are minutely and particularly attended to by the solicitor as the client proceeds. How is it possible for the mind of the solicitor to travel with advantage through a long statement, so as to fix his attention upon the material parts of it, without previously knowing what the difficulties are? Could any one, whilst a party was describing an intricate and difficult road, keep a distinct view or recollection of the windings and turnings, so as to be able to form a judgment of the course being right or wrong, if it were not previously known at what place it was intended to arrive? If the solicitor should chance to hear, or be obliged to hear, the whole story, before the difficulties or questions are announced, he will be obliged to retain all or nearly all that has been told him, in order to separate the material from the immaterial facts.

The solicitor having ascertained the difficulties or questions, and having obtained a full statement of his client's case, his mind is then enabled to take a full survey of the subject in all its bearings; and, having reflected upon it, is then ripe to give his judgment. It is then, and not till then, that he should impart his opinion to his client, in a clear, perspicuous, and satisfactory manner, "without thinking aloud," or perplexing his client with all that had been passing in his mind before he came to his conclusion. If he be not careful in this respect, he will perplex and confuse his client. His course should be straight forward and directly to the point. If, however, any doubt should remain with the solicitor, he should state that doubt separately and distinctly from his opinion, so as to show to his client that it has not escaped him; but he must not hesitate, although he express that doubt, to give the best opinion he has formed on the subject, and according to the confidence placed in that opinion will the client be determined.

In giving the opinion formed, it may be necessary to state the circumstances of the case, so that the client may be convinced that the solicitor understands them. If the client should be found to have a strong impression on his mind different from the opinion of the solicitor, then it is necessary to grapple with that impression, and by the most cogent arguments convince the client of his mistake, and thereby also convince him that the solicitor is fully master of the view the client takes of the case, and that the solicitor has not formed his opinion without a due consideration of it. But the solicitor, to do this effectually, must look at the case in the very same light in which it is looked at by the client, and manifest that he does so by the observations and explanations he will make and give to his client. Unless this be particularly attended to, the client will leave his solicitor without being convinced or satisfied.

Should any serious doubt remain in the solicitor's mind, or in the mind of the client, after the whole subject has been discussed, the solicitor should not commit himself to any positive opinion until he has further considered the subject; and to give him the opportunity of considering it, he should appoint another interview. Before seeing the client again, the solicitor ought not only to sift thoroughly the particulars of the case, but all the decisions applicable to the principle upon which the case should be determined; and having mastered this principle, and made himself well acquainted with the cases on the subject, he will be ready at his next interview to give his opinion; but should any doubt still remain on his mind, or should the doubt be so serious at the first interview as to require it, he should state his doubt, and recommend the opinion of counsel to be taken for the satisfaction and protection of his client.

LAW ASSOCIATION

FOR THE BENEFIT OF THE WIDOWS AND FAMILIES OF PROFESSIONAL MEN.

We are happy to render our assistance in making known the nature and objects of this benevolent Society; and shall take an early opportunity to make some extracts from the Annual Reports which we have procured.

"This Association consists of Attorneys and Solicitors residing and practising *in the Metropolis, or within the Bills of Mortality;* and the following are its objects, viz.—

"'To grant relief to the widow and children of any deceased Member, dying in distressed circumstances, and in the event of his death without leaving a widow or child, then to other relatives dependent on him for support.*

"'To allow a widow or family a sum of

* "By a resolution of a General Court, the Directors are now authorised to devote 200*l.* per annum to the aid of distressed widows and families of professional men *not having been Members of the Association.*"

money, in lieu of an annual payment, with a view to an establishment in business or employment.

" 'To take measures for promoting the interests of any deserving widow and family, by patronage and recommendation.

" 'To advance a sum of money for educating, apprenticing, or otherwise assisting any of the family of a Member dying in distressed circumstances.

" 'To allow assistance to any Member who may be involved in pecuniary difficulties, in consequence of inability to conduct his business from bodily or mental infirmity, or other involuntary calamity.'

"To that branch of the profession this Institution is now earnestly recommended, as a plan well calculated to alleviate the misfortunes of domestic life, in cases where, by the premature death or the incapacity of a professional man, he or his family might become destitute of the means of support.

" It has often been matter of surprise, that, while all other professions had long since united in benevolent contributions for guarding against such calamities, no institution of the kind among the Members of the Law had hitherto existed, although many afflicting instances have occurred, sufficient to manifest its expediency.

" If, however, the delay in forming such an establishment be a cause of regret, it is a source of great satisfaction to perceive that, as soon as the plan was adopted, it experienced an encouragement almost unexampled, and highly gratifying to every benevolent mind.

" Within less than five years the Society was enabled to realise the whole of the capital of 10,000*l.* stock, required, by the 45th Regulation, for the commencement of its benevolent operations.

" This successful progress of the Association will, it is hoped, be an incitement to other professional gentlemen, whether practising or retired, to become contributors to this useful and benevolent fund; and by these means to enable the Institution to hold out a more liberal assistance to those who may unhappily become applicants for its bounty.

" Honoured with high legal patronage, and zealously supported by a large proportion of the most eminent of that branch of the profession by which it has been established, the Association, so unobjectionable in principle, and so truly laudable in its design, may be considered as fixed on a solid and lasting basis."

DISPUTED DECISIONS.

TRESPASS.—SHOOTING DOGS.

I CANNOT agree with your correspondent T. P.* in his objections to the decision of Mr. Justice *Alderson* in *Wells* v. *Head*, and which, he says, the true principle of our law will not support.

The law with respect to persons keeping mischievous dogs, (according to Blackstone and the cases cited by your correspondent, and I do not know of any alteration having taken place since,) is, if a man keeps a dog or other brute animal used to do mischief, as by worrying sheep, or the like, the owner must answer for the consequences, if he knows of such evil propensity, and which the plaintiff did in this instance. Now, what I understand by this, is, the owner must answer at law, that is, he is liable to an action for whatever damage his dog may have committed; and I cannot find in any one case your correspondent has brought forward, that the law has gone so far as empowering the person damnified to shoot the dog after having committed the injury; it only says, the owner is liable to the *consequences*, that is, for the amount of the damage done.

In support of the argument of Mr. Justice Alderson, it is reported, in 1 Saund. 84. S.C., 3 Salk. 139., that where a mastiff falls on another dog, the owner of that dog cannot justify the killing the mastiff, unless there was no other way to save his dog, as that he could not take off the mastiff. The principle on which this case was decided, I think, will equally apply to the present. I certainly think, with the learned judge, that if the defendant had, at the time the dog was worrying the sheep, shot him, having *no other way* of keeping him off, he might then have been justified in so doing; but shooting him after, I humbly contend is against the law as laid down, and, therefore, that the decision of the learned Judge was in complete accordance with the law, the defendant having a clear right of action for the damage done. T. E.

* Page 392. Vol. I.

ON THE LAW OF COSTS.

THE present law of costs is, in many respects, difficult to be understood, and requires consolidation and simplifying. When a question arises upon the statute of Gloucester (which is the first act awarding costs), it is necessary to consider whether the action in question is of that nature upon which *damages* could have been recovered at common law, or by virtue of that statute. Here, then, arises much trouble of research, and it is frequently impossible to arrive at a satisfactory conclusion.

After the statute of Gloucester the act of 43 Eliz. c. 6. was passed, the words of which would appear comprehensive and sufficient; but the contrary was soon proved; and in the reign of Charles the Second another act was passed, to remedy its imperfections; and which statute has received a construction, particularly in the words "personal actions," that seems quite contrary to the intention of the framers of the act.

Upon the two last-mentioned statutes distinctions in cases have been so very nice, that it is acknowledged to be difficult to know with certainty when a case comes under either of them.

The statute of 8 & 9 W. 3. c. 11. was afterwards passed, for preventing wilful and malicious trespasses, and giving a plaintiff his costs when the damages are under

forty shillings, if the judge certifies that the trespass was wilful and malicious. These several acts are rather connected with the costs of *plaintiffs* only.

The costs of *defendants* are regulated, but not at all with certainty, by 23 Hen. 8. c. 15., 24 Hen. 8. c. 8., 4 Jac. 1. c. 3., and 8 & 9 W. 3. c. 11. The decisions upon the last mentioned statutes have been so much at variance, that it is more difficult to know when and in what actions defendants can recover costs, than it is to know when plaintiffs can recover their costs, and to what amount.

The before-mentioned several statutes are set forth, being the general acts; but it must not be supposed that on these alone depends the law of costs; for the law upon this subject, in particular actions and cases, is scattered throughout the statute books, — certain persons never pay costs, some only when defendants, and some are entitled, in certain cases, to double and treble costs; and indeed in this, as is too often the case, custom varies the law.

In the present time of reformation, let us hope that ere long some one competent to the task will simplify and consolidate the law on this subject, which is as much connected with the interest of the community as the prevention of crime. It is distinct from all others, and might be settled at once, without interfering, in the slightest degree, with the plan marked out by the commissioners who are now considering what beneficial alterations can be made in the still imperfect, though much improved, laws of the country.

H. G.

PARLIAMENTARY AGENCY.

To the Editor of the Legal Observer.

SIR,

I PERFECTLY agree with your correspondent A.S. in your 24th Number, that it is an extraordinary fact, that solicitors who have contributed, and who are daily contributing, so largely towards the public revenue for leave to carry on their profession, should so quietly stand by and permit the most honourable and profitable part of their business to be usurped by clerks and other persons, wholly unacquainted with law, and mostly uneducated, to the detriment of the legal profession, the scandal of the government, and the obstruction of their own official duties.

A solicitor generally receives a superior and expensive education. He then pays a duty of 120*l.* on his articles of clerkship, besides a premium, on an average, of 200*l.* His friends have to maintain and clothe him for the five years of his clerkship, at an expense of about 150*l. per annum*, and then he has to pay a duty on his admission of 25*l.*; so that, before he can even *commence* business he has to expend about 1100*l.* to qualify himself to act; and, after that, he has to pay 12*l.* annually for a certificate for permission to carry on his business. On the other hand, the class of persons called "*parliamentary agents*" consists mostly of clerks, not professing the slightest pretensions to legal knowledge, of little or no education, receiving salaries from the government, and contributing nothing towards the fiscal burdens of the legal profession. Is it to be wondered at, then, that the statute book should be so often clogged and disgraced with acts to "*explain and amend*" laws passed in a preceding session? Surely, Sir, the attention of Lord Brougham and the Law Societies ought to be directed to this important subject, and a meeting convened to consider of the best means of rescuing the rights and privileges of the profession from this set of unlettered and uncertificated interlopers, and to regulate the practice. The apothecaries have very properly vindicated their rights, and obtained an act of parliament for their protection; and why should not solicitors do the like? At this moment, I believe, there are but two solicitors who practise as parliamentary agents; but I confidently anticipate the period when every solicitor will transact his own parliamentary business, without the intervention of any agent at all.

I am, Sir, your obedient Servant,

P. Q.

Temple, April 18. 1831.

COSTS OF RECOVERING SMALL DEBTS.

To the Editor of the Legal Observer.

SIR,

AMONG the mercantile people of the country there is a great wish for the establishment of local courts for the recovery of small debts in a cheap and expeditious manner. They do not see, however, the difficulties and objections to such courts; they severely feel the inconvenience of the present system, and they desire a remedy for it. If local courts are not the proper remedy, and it is generally allowed among professional men that they are not, what is to be done? Certain it is that the present system needs amendment. Now, Sir, if London agents were questioned on the subject, they would attest that by far the majority of the actions brought are of the most simple kind, to which no kind of defence can be offered, and which are defended merely for the purpose of obtaining time, and of putting off the evil day of payment. The average of the costs incurred in these cases may be, perhaps, 8*l.* or 10*l.*, (for few of them go to trial,) and at this price does the defendant purchase the delay of a month or two; that is, if he pay ultimately; if he do not, the creditor must pay these costs, besides losing his debt; and this fear of "throwing good money after bad," as tradesmen commonly express it, deters them from suing, and, besides, holds out an inducement to men to incur debts without the means of payment.

To correct this evil, I propose that the writ or summons to the defendant should briefly state the cause of action, somewhat more particularly than affidavits to hold to bail express

it. Within a certain time, perhaps fourteen days after service of the writ, or the arrest, the defendant should be obliged to file an affidavit of merits, stating shortly (in order to avoid perjury) the grounds of his defence; and in default of his filing such affidavit within fourteen days, judgment should be signed against him at the expiration of a month from the service of the writ; which time I would allow for the defendant to "agree with his adversary," or provide for payment. Perhaps judgment might be permitted to be signed on the fifteenth day, and permission be given to the defendant to apply to a judge for time to pay, on giving security. I believe the adoption of this plan would put an end to the evil I have mentioned, and that it would, in the majority of actions, reduce the costs to those of writ and judgment only.

In cases where affidavits of merits were filed, I would allow the plaintiff to deliver a declaration, stating more precisely his cause of action; but since, in the kind of actions I have above alluded to, the statement in the writ would be a sufficient declaration, I would not allow, in taxation, the costs of a new declaration.

Lord *Wynford*'s act for examining parties on interrogatories (the *plan* of which is excellent) goes somewhat on the same principle as the above proposed alteration, and, if it should pass, will be more extensively useful; still, the obvious facility of adopting the latter suggestion, and the good results to be expected from it, induce me to offer it to your consideration and to that of your readers, if you think it worthy a place in your excellent publication.

Your obedient servant,

April 5. 1831. G. H.

DISCHARGE OF INSOLVENT DEBTORS.

To the Editor of the Legal Observer.

Sir,

The remarks of your correspondent B. A., in your last number, under the head of "Detainer of Insolvent Debtors," I quite concur in, and at the same time I wish to bring under your notice another point quite as preposterous.

It happens, and not unfrequently either, that after a man has petitioned the Insolvent Court, and has taken all the necessary proceedings, and is ordered to be heard at a given day, his detaining creditor, shortly before that day arrives; thinks proper, from mere caprice, or some other motive, to send his discharge; and thus renders unavailing all the expense incurred and the imprisonment suffered at his suit. Of course, I am not speaking of arrests made by a friend, by way of assisting an application; for where such is the case, the circumstance I have referred to will not occur; but I refer to arrests really hostile.

It seems to me the evil complained of by B. A., and that I have stated, ought to be remedied; and it might be done by the legislature declaring, that from the time a petition is filed, no discharge but that of the Insolvent Court should be of any avail.

I am, Sir,

Your obedient Servant,

May 2. 1831. W. P. S.

SUPERIOR COURTS.

LORD CHANCELLOR'S COURT.

INFORMATION — CHARITY.

This was an appeal from an order of the Master of the Rolls, dismissing the information. It appeared that in 1653 Sir Gervas Clinton left certain lands to Robert Leake and others, for the benefit of the parish of Aubury, and to be applied according to the sole discretion of Robert Leake for three years, and afterwards at the discretion of him and the other trustees and their heirs. Various appropriations had been made of the fund arising from the rent of these lands by succeeding trustees; 15*l.* were paid annually to the clergyman; other sums were applied to the maintenance of the poor in the almshouses; and recently a considerable sum had been expended in the repairs of the parish church. The information, therefore, prayed that the Court might direct an account to be taken; and that the Master should settle a proper scheme for the future government of the fund, which amounted to 250*l.* per annum.

The *Master of the Rolls* was of opinion, that, as the gift had been for charitable purposes, it was improperly applied to such purposes as it fell properly on the inhabitants to effect by their own means, and dismissed the information.

The *Solicitor-General* and Mr. *Merivale* contended that this direction was reasonable and just, and ought to have been made; and that the application of the fund, not having been strictly for the benefit of the parish, was not in accordance with the will of the donor.

Sir *E. Sugden*, Mr. *Pepys*, and Mr. *Cooper*, supported the decree. The sum which had been applied to the increase of the clergyman's stipend had been given to him at a time when the living was very small. It had since been increased; and there was now no reason why the charity fund should contribute to it, and it had accordingly been discontinued. The other applications, they contended, were properly within the discretion with which the donor had thought fit to invest the trustees.

The *Lord Chancellor* was of the same opinion as the Master of the Rolls, and dismissed the appeal, without costs. — *Attorney-General* v. *Gaskill*. L.C. April 26. 1831.

VENDOR AND PURCHASER — COMPENSATION.

This was an appeal from a judgment of the Vice-Chancellor. A contract had been entered into between plaintiff and defendant for the purchase of an estate in the Island of Ely; and the present bill was filed on the part of the plaintiff, the vendor, to compel a specific performance of the contract. The defendant resisted it, on the ground that the estate was fen land, and was liable to a tax of 2*s.* per acre, which was not disclosed at the time of the sale; and he therefore submitted that he was entitled to a compensation for this defect. It was contended, for the plaintiff, that the tax was imposed by authority of parliament; and that the circumstance of the land being charged was known to every one; that the defendant was a practising attorney, within 15 miles of the estate; and that at the

time of the sale the defendant had received such notice of the tax as cast upon him the burden of ascertaining its amount; and that therefore, if he had not done so, he must abide the consequence of his neglect.

The *Vice-Chancellor*, on these grounds, decided that the defendant was not entitled to compensation; from which decision the defendant appealed to the Lord Chancellor.

Mr. *Solicitor-General* and Mr. *Rolfe* appeared for the appellant; Sir *E. Sugden* and Mr. *Keene* for the respondent.

The *Lord Chancellor* said that he was disposed to concur in the opinion of the Vice-Chancellor; and that the defendant had sufficient notice of the tax; and that he was not entitled to compensation. He therefore affirmed the decision of the Court below, but reserved the question of costs for further consideration. — *Barraud* v. *Archer*. L.C. April 26. 1831.

KING'S BENCH.

SHERIFF — LANDLORD AND TENANT.

Foster v. *Hilton*.

Chilton showed cause against a rule, calling on the plaintiff to show cause why, on the payment of 75*l.* 15*s.* 6*d.* to the plaintiff's attorney, all proceedings should not be stayed, and the plaintiff pay the costs of this application? It was an action founded on the 8 Ann. c. 14. § 1. against the sheriff for removing goods from the premises, in which he had executed a distress after notice had been given that a year's rent was due to the landlord. The sum proposed to be paid to the plaintiff was short of a year's rent; he therefore insisted that until a year's rent had been paid to the landlord the sheriff had no right to sell. Here a sale had taken place; and although the proceeds amounted to less than half a year's rent, the sheriff could not stay these proceedings, because it was necessary to pay a year's rent before the goods were sold.

Taunton J. Where do you find any authority for saying that a year's rent must be paid before the goods are sold?

Chilton. I contend that that is the fair construction of the statute. If there is not enough on the premises to pay a year's rent, the sheriff, I conceive, must withdraw.

Taunton J. The words of the statute are, "before the removal of such goods from off the said premises;" not before the sale of those goods.

Chilton. I contend that the sheriff must withdraw; and if he chooses to sell, the mere payment of the sum produced by the sale is not sufficient to entitle him to have the proceedings against him stayed.

Platt, in support of the rule, contended that the plaintiff could only be entitled to recover the amount which the sale produced. It could not be said that, when the sheriff received 75*l.* 15*s.* 6*d.* from the sale of the goods, he was bound to pay more to the plaintiff. If so, it was exceedingly unjust to force the sheriff to go on, and to pay the costs of the suit. He referred to the case of *Henchett* v. *Kimpson*, 2 Wil. p. 141. There the sheriff had sold, and the proceeds of the sale were not equal to the amount of rent due. The counsel against the sheriff relied there on the construction of the act of parliament now adopted by Mr. Chilton. But the Court there said, "Let the prothonotary take an account of the goods taken in execution, and what they were sold for, and let the sheriff be allowed such costs as were incurred before notice given him of the rent due to the landlord, and after all just allowances, let the rest of the money be paid by the sheriff to the landlord."

Taunton J. There the parties proceeded by motion; but here they proceeded by action. The question, therefore, is, whether this case must not be left in the hands of the jury.

Platt submitted that the principle in both cases was the same. The application in both cases was to the equitable jurisdiction of the court. It was to the power which the court exercised to prevent its proceedings from being made instrumental to injustice. It was on the same principle that, where conflicting claims were made by the assignees of a bankrupt and a judgment creditor, the court interfered, to prevent the sheriff from being subjected to the injustice which would arise from his being forced to determine those claims. The sheriff was here ready to pay the money which he had levied. It would hardly be said that he was bound to pay more than he had himself received.

Taunton J. My opinion is, that the court cannot interfere in this summary way. The act of parliament provides that, before the removal of goods from the premises, the sheriff shall pay a year's rent; and if the sheriff is guilty of any contravention of that act of parliament the landlord may apply to this court by a rule calling on the sheriff to pay over to him what the goods produced on the levy. The landlord has not resorted to the summary jurisdiction of this court. If he had applied to this court by motion, then the court might have done that which was done in *Henchett* v. *Kimpson*; that is to say, might have referred the matter to the Master, to take an account of the goods taken in execution, and what they were sold for, and have directed that the sheriff should be allowed such costs as he had incurred before notice was given him of rent being due to the landlord; and after all allowances let the rest of the money be paid by the sheriff to the landlord. But the landlord here has not thought proper to avail himself of the summary jurisdiction of this court. He has proceeded by action on the case. He has a right so to do. On a special action on the case, the landlord is entitled to general damages. Those damages are not to be limited by the mere amount of the sum of money produced by the sale. He has a right to say, that if you had proceeded regularly according to the statute, the whole rent would have been paid; and you not having proceeded regularly, but having chosen to sell before the year's rent was paid, I have a right to general damages; but for your misconduct in not giving proper notice, or by other negligent conduct, the goods sold badly. All these matters may be made use of to aggravate the damages. This is an application, that all the proceedings in the case should be stayed, o paying merely the dry proceeds of the goo

after sale. I am of opinion that is not the strict measure of damages. The damages may exceed that measure, and therefore the court is not now to take that as a measure, which may not be taken as one at the trial. The rule must therefore be discharged, and with costs, as it is a new experiment, for which there is no precedent as far as I know.

Rule discharged with costs.

COSTS OF QUO WARRANTO.

Rex v. *Day*; *Rex* v. *Patteson*.

Quo warranto for usurping the office of Alderman of the city of Norwich. — Rules had been obtained on a former day, calling upon the relator to show cause why he should not give security for costs in these prosecutions, on affidavits stating that the relator (a freeman of the city of Norwich, and entitled to vote at the election of aldermen) was in indigent circumstances; that the proceedings were instituted for local electioneering purposes, and were in fact carried on by the subscription of certain individuals named in the affidavits. It was also ordered that all proceedings should be stayed until cause should be shown.

Austin now showed cause, and contended that the application was too late. In *R.* v. *Wynne* (2 M. & S. 346.), *R.* v. *Trevenen* (2 B. & A. 339.), and *R.* v. *Wakelin* (1 B. & Adolph. 50.), which were the only cases similar to the present, the application was made, in the first case, after information filed; and in the two others, the question of security for costs was raised upon the motion for making absolute the rule for exhibiting the informations. But there is no difference in principle between these cases and the case of similar applications in civil actions. In civil suits, where the defendant applies for security for costs in consequence of the plaintiff's residence abroad, the rule is, that he shall make his application as soon as he is aware of the fact; and that he shall take no step after he becomes cognisant of the fact, and before his application for security. The rule is clearly laid down in *Duncan* v. *Stint* (5 B. & A. 702.), where it was said by the Court, that "when a cause is pending, a party, if he means to apply for security for costs, must take no step after he knows that the plaintiff is out of England; for a defendant ought not to wait until expense has been necessarily incurred, which must frequently be the case, particularly in actions of trespass and replevin." The last observation applies as well to pleadings in *quo warranto*, which are frequently of great length. In this case the information was filed in Michaelmas Term, 1829; the pleas, which were very voluminous, not till Trinity Term, 1830. Long replications were afterwards filed, to which the defendants had rejoined, and added the *similiter*. There was no affidavit (as there ought to have been, had the fact been so, *Duncan* v. *Stint*,) that the defendants did not know the circumstances disclosed in their affidavits before their pleas were filed. The rules must be discharged with costs, because they were drawn up for staying proceedings as well as for security for costs.—*Baille* v. *De Bernales*, 1 B. & A. 331.

Kelly, *contrà*. Issue has not been joined; for the *similiters* which had been added by the defendants were afterwards struck out by the prosecutor.

Patteson J. At all events, issue had been joined, so far as the defendants are concerned; for the *similiters* were added by themselves.

Kelly. Allowing that to be so, although security cannot be demanded for costs already incurred, the Court may impose it for the costs to be incurred hereafter. *Duncan* v. *Stint* does not apply. In that case the ground of the application was the plaintiff's residence abroad; in this, it is the relator's indigence; and the circumstance of the proceedings being carried on by subscription. In the case of a bankrupt plaintiff, security for costs has been imposed, on the ground of the action being really carried on for the benefit of the assignees.

Patteson J. The relator is a freeman, and entitled under the statute 9 Ann. c. 20., to institute these proceedings. The parties have proceeded to issue; and it does not appear that the defendants were not aware of the circumstances disclosed in their affidavits before issue joined, or, in fact, at the time of filing the informations. The rule adopted in civil actions is applicable here. According to that rule, the present application comes too late; and the rules which have been obtained must be discharged. As the point was clear, this application was a mere experiment; for which reason, and because the rules were drawn up for a stay of proceedings as well as for security for costs, the rules must be discharged with costs.

Rule discharged with costs.

SETTLEMENT BY APPRENTICESHIP.

The King v. *The Inhabitants of Alston*.

The pauper and his family were removed by an order of two justices from the parish of Hexham, in the county of Northumberland, to the parish of Alston, in the same county. The sessions confirmed the order, subject to the opinion of the Court of King's Bench on the following case: — The respondents established a *primâ facie* settlement of the pauper, Edward Davison, by parentage, in the parish of Alston. On the part of the appellants it was then proved, that the pauper, Edward Davison, when about nineteen years of age, bound himself as an apprentice to John Ostle of North Shields, in the county of Northumberland, shipowner, by indenture bearing date the 26th day of August, 1809, for the term of three years; and that in the first year of the pauper's apprenticeship, the ship in which the pauper served was moored for a month in the township of Middlesborough, in the county of York, which township separately maintains its own poor; and that, in the second year of his apprenticeship, the same ship in which the pauper still continued to serve, was moored in the said township of Middlesborough for five weeks; and that, during the said month and five weeks, he slept on board the said ship. The question for the opinion of the Court of King's Bench is, whether the pauper, Edward Davison, gained a settlement in the said township of Middlesborough, by serving as aforesaid, and residing

upwards of forty days in Middlesborough, under the indenture of apprenticeship, the said forty days not having been in one and the same year of his apprenticeship?

Charles Clark, for the respondents, said, that it was not his intention to deny that residences at different times, in the same place, might be connected, so as to form a residence of forty days within the terms of the statute; but he contended that these residences must have happened within the same year. In the case of *Rex* v. *Rustington*, 6 M. & S. 396., the pauper, who was a certificated apprentice from Rustington to Newhaven, slept in the course of his service more than forty nights in St. Thomas à Beckett, but could not take upon himself to say that he slept there forty nights in any one year of the term: he slept the last night of his apprenticeship at Newhaven. Mr. Justice *Bayley* there said, "The law on this branch of settlement is, that an apprentice is settled in the parish where he sleeps the last night of his apprenticeship, if he has slept there altogether during the year for forty nights;" and the order for settling the pauper in the certifying parish was confirmed. The case of *Rex* v. *Denham*, 1 M. & S. 221., was even stronger. There the pauper was hired for a year to George Smith, and served that year, at the expiration of which he was hired for another year, and served half of it, and during that year and a half he was resident in Basingstoke for forty days; but he did not reside in Basingstoke for forty days either within the first year or within the half year, nor within any one period of a year, whilst he continued with Smith. The sessions thought that residence was not sufficient, and the Court confirmed their opinion; Lord Ellenborough, who delivered the judgment, observing, "It has never been decided that residences beyond the compass of a year may be connected. Suppose the same service to continue uninterruptedly for twenty years, and the servant to sleep twice in every of such twenty years at the same inn in travelling, and to be at that inn the last night of his service, would it be expedient and reasonable that an enquiry extending over so long a period of time, at detached intervals, should be gone into, for the purpose of ascertaining the settlement of a pauper?" The same remark might be applied to the case of an apprentice, whose indenture might extend over any given number of years, and whose settlement might thus be kept in suspense till the last night of his sleeping in one of the places in which he had before slept, determined to which of them he belonged. The case of *Rex* v. *Fendon*, 4 B. & C. 91., confirmed that of *Rex* v. *Denham*, as far as it went, and only decided that the year was not to be computed from the end of the year of service. There was no case in which this point had been precisely determined; but there were none that went to impeach the doctrine now contended for, since it appeared, upon examination of all the cases in which different services or residences had been connected together, that the two thus connected had both happened within the same year. The case of *Rex* v. *Brighthelmstone*, 5 T. R. 188., was an example of this kind; and that case contained a declaration made by Lord Kenyon, and not contradicted by the rest of the Court, that in this respect the cases of servants and apprentices were not distinguishable. In that case, too, his Lordship referred to the opinions of former Judges, who had expressed their regret that different services had ever been suffered to be connected so as to gain a settlement; a regret in which his Lordship seemed to participate. Mr. Nolan, too, in his book on the Poor Laws (vol. i. p. 467.), had distinctly stated it as his opinion, that the statute seemed to have intended the forty days should have been successive.

Rogers, contrà, insisted that the Courts had always adopted the very natural and obvious distinction between the cases of servants and apprentices. The doctrine of connecting services was fully established; and whatever regret might once have been expressed on that subject, it had been so often adopted by the Court, that it was now one of the best known rules of settlement cases. He cited *Rex* v. *Gainsborough*, 1 Bur. S. C.

The *Court* stopped him, and gave judgment for the appellants.

REMOVAL OF CAUSE BY HABEAS.

Anonymous.

Clarkson applied for a *procedendo* to the Sheriff's Court of the city of London, directing it to proceed with a cause which had been removed by *habeas* into this court, and in which no bail had justified.

Taunton J. enquired of the Master what was the practice on that point.

The *Master* reported that the *procedendo* issued as a matter of course, in such a case, and that there was no occasion for an application to the court.

BAIL — TAKING MONEY OUT OF COURT.

The rule for taking money out of court, which had been paid in, in lieu of special bail, under 7 & 8 Geo. 4. c. 71. § 2. is absolute in the first instance. *Taunton* J.

ATTORNEY, ADMISSION OF.

Anonymous.

Holroyd applied to the court on the part of a gentleman, whose name he did not mention, for leave now to enter his name and place of abode, and also the name and place of abode of the attorney with whom he was articled, at the chambers of Mr. Justice Taunton; as that entry, which is required by the rule of court, "that he shall enter, or cause to be entered, in a book to be kept for that purpose, at each of the judges' chambers of this court, his name and place of abode, and also the name and place of abode of the attorney or attorneys to whom he shall have been articled," had not been made. The facts were these. Since the increase in the number of judges, under the 11 Geo. 4. and 1 W. 4. c. 70. § 1., Mr. Justice Littledale and Mr. Justic Taunton had made use of the same chambe Two books, however, for the above purpose w

kept. The person who went to make the entry, not being aware of the circumstance, only made it in one book. In order to comply strictly with the letter of the rule, "each of the judges' chambers," it was necessary that there should have been an entry in both books. The application, therefore, was to be permitted to make that entry now.

Taunton J. You may make the entry now.

Rule absolute, in the first instance.

JUDGMENT FOR WANT OF A PLEA.

Rex v. ———.

Adolphus showed cause against a rule obtained by *Clarkson*, calling on the prosecutors to show cause why the judgment signed against the defendant for want of a plea should not be set aside, and the defendant permitted to come in to plead, and take his trial. The defendant had been indicted for a misdemeanour, and had suffered judgment to be signed against him for want of a plea. This was nearly six years ago. The indictment had originally been preferred at the quarter sessions, but was removed by *certiorari* at the instance of the defendant into this court. Now, the reason given by the defendant for not coming in and pleading, and not applying to the court before, was, that he had been going and returning from London to France. He must, at the time of the indictment, and at any time during the six years now elapsed since that period, have been as well able to defend himself as at the present moment. Why should he be allowed to lie by for this long period, in order to take the chance of death or other events preventing the indictment from being prosecuted with effect?

Clarkson, contrà, was stopped by the Court.

Taunton J. I don't think it would be contrary to justice that this defendant should be allowed to come in and plead and take his trial. There is no affidavit that the witnesses for the prosecution are either dead or abroad; and therefore the prosecutors are in as good a situation as before for the purpose of supporting their indictment. The defendant may therefore come in on giving security to take his trial, himself in 500*l.* and two sureties in 250*l.* each.

Rule absolute.

YORK SPRING ASSIZES.

NUISANCE—RAILWAYS.

BEFORE MR. JUSTICE JAMES PARKE.

The King v. *Pease and others.*

Mr. *Williams* (with whom was Mr. *Heaton*) said that this was an indictment for a nuisance. It appeared that some gentlemen, for their private emolument, and upon a speculation for that purpose, were by an act of parliament empowered to erect a railway from Darlington to Stockton; and they were, by the first act of parliament, to lay it in a given line, with a power to deviate to the extent of one hundred yards from the projected line. The prosecutors were gentlemen residing in the neighbourhood, magistrates of the county, and some other persons, who, either in their own persons or by their property, had sustained injury from this undertaking. That the rail-road had existed since 1825, and that part of the defendants were committee-men, and active in the management of the railway on the line, was past a doubt. Complaints were early made of the nature of the rail-road, and of the effects it was likely to produce upon the king's subjects travelling on the turnpike road from Yarm to Stockton. The main grievance which was complained of was that for upwards of a mile and three quarters this rail-road, with the locomotive engines upon it, runs parallel to the turnpike road, at an average distance of about fifty feet between the rail-road or tramway and the crown of the road on which his Majesty's subjects are in the habit of travelling. In some cases the distance was only 30 feet, and in others 100 feet; but averaging 50 feet for a mile and three quarters. If it had been the misfortune of any of the jury to be near one of those engines, and particularly on horseback, they would be aware of the antipathy of the horse to these conveyances. If he should prove that the machines frequently frightened horses, and caused them to plunge or turn back, to overturn vehicles, or run away over the fences, and that horses were obliged to be put into a barn till the engines passed, who had afterwards come out sweating as they do after hearing a distant cannonade, he apprehended he should be entitled to their verdict.

Mr. *Pollock* said he would admit that, if the whole of the property on each side of the road belonged to the defendants, it would not justify their crossing the road, as they did in many places, but for the act of parliament.

His Lordship said that in that case it would resolve itself into a mere point of law, as to what were the powers given by the act.

Mr. *Williams* said he was glad to hear the observation of his learned friend, as it would afford much facility in shortening the case. If the defendants legally could not cross the road, *à fortiori* they could not justify running parallel to it for nearly two miles.

The learned gentleman then called several witnesses to prove that wagons drawn by six horses, coaches drawn by four horses, and lesser vehicles, had been overturned in consequence of the fright of the animals by the locomotive engines. The same cause frequently made saddle horses plunge, rear, start aside, or turn round and gallop a considerable distance.

Mr. Ayres, a wine merchant at Stockton, deposed that the horse he was driving in a gig took fright while passing one of the locomotive engines, in consequence of the fireman beginning to stir up the fire, which caused the chimney to emit sparks and smoke.

Mr. *Pollock* submitted that the incautious stirring of a fire by the defendants' servant, when a wine merchant was passing in a gig, could not be given in evidence against the defendants. Under the act of parliament passed in 1821 they had an absolute right to erect the road, and therefore could not be guilty of nuisance for doing so. By the act of parliament in 1823 they had a clear right to use locomotive engines.

Some other witnesses were then examined, after which his Lordship said he thought the

cause might be brought into a shorter compass than going into the whole case. It was rather a question of law as to what were the powers given by the act.

Mr. *Pollock* was ready to admit, and did admit, that it was a nuisance but for the act of parliament; and he would take a special verdict to that effect.

Mr. *Williams* saw no objection to that course unless a question was to be raised as to the excess of the nuisance, in which case he must be at liberty to bring forward evidence to that point.

Mr. *Pollock*—Then my learned friend must go on with his case.

Other evidence was then given as to the frequent accidents occasioned by the locomotive engines; and

Mr. Ottley, the secretary to the company, was called to prove that the defendants were shareholders, directors, or servants of the company. On cross-examination, he stated the quantity of coal which passed along the railway down to the river Tees, at Middlebury, amounted to 171,000 tons for the year ending 30th of January, 1830; that there were now seven engines on the railway; that the number of engines required by the company was more than that; that the expense of carriage by the railway was in the proportion of 90*l.* to 160*l.* by the old plan; that the engines of the company were constructed on the best principle, and had been from time to time improved.

Mr. *Pollock* replied, contending, that, as the railway and engines were established under the authority of acts of parliament, they could not be considered as nuisances. His Lordship had suggested a special verdict, and he hoped his Lordship would adhere to it.

His Lordship said he saw no objection to a special verdict. Upon the evidence of Ottley it appeared that due care and caution had been used to make the thing as little a nuisance as possible. It was agreed that the Jury should find that the matter complained of was a nuisance, unless authorised by the acts of parliament and the facts proved upon his Lordship's notes. The jury found accordingly.

MINOR CORRESPONDENCE.

NEW BUILDING ACT.

In the act now in force, there is no provision against persons introducing untried inventions in buildings, if the scantling of the materials in the invention are within the act, although the design and construction may be bad, or the principles misapplied. In a future act, would it not be advisable to supply the omission?

J. B.

ANSWERS TO QUERIES IN NO. XXIV.

ATTESTATION OF WILL.

1. If the fact be that the attestation was made in the presence of the devisor, the omission in the memorandum to that effect would not invalidate the devise. But it is to be observed, that no purchaser would take a title under such a will without proof *per testes*. It should also be so proved, as a protection against the heir at law, in case of the witness's death.

I am aware of no authority, but there can hardly be any doubt on the point.

H. F. G.

2. The statute of frauds does not require that the *attestation* should *state* that the witnesses attested the will in the testator's presence; and it is immaterial if it does not so appear upon the face of the will, if the *fact* of their having signed in his presence can be proved. See 4 Taunton, 217.; and *Rancliff* v. *Parkyns*, 6 Dow, 202.

3. Though the clause of attestation generally expresses that the witnesses subscribed in the presence of the testator, yet such a statement is not absolutely necessary (8 Vin. Abr. tit. *Devise*, 142. pl. 5.); for the statute does not in terms require that notice of the attestation having been so made should be expressed in the subscription; and whether expressed or not, proof must be produced of its having been duly done. (Com. Rep. 531. Stran. 1109.)

T. E.

4. The statute of frauds requires that a will should be attested in the presence of the testator, but by no means that the compliance therewith should be stated in the attestation; for, were it stated, the contrary might be proved; therefore, the decision of that fact must ever rest with a jury, and, until so decided, there cannot be a doubt of the validity of the devise. This my opinion has been confirmed by the cases of *Hands* v. *James*, and *Croft* v. *Pawlett*, as cited in 6 Cruise, 57. and 58.

A SUBSCRIBER.

QUERIES.

PARTNERSHIP LEASE.

It is decided, that if the lease of premises, where a joint trade is carried on, be renewed by one partner, in his own name, clandestinely, it is a trust for the partnership, and is to be accounted for as partnership property. *Featherstonehaugh* v. *Fenwick*, 17 Ves. 298.; *Burroughs* v. *Elton*, 11 Ves. 29. Now *A.* and *B.*, some time since, entered into a contract to become partners for the term of five years, that being the term for which the lease of the premises taken by them had to run. *A* is desirous of renewing the lease in his own name, without waiting for the determination of the present one, as his intentions are to continue the business on his separate account after the dissolution, and no other premises can be found so well adapted for his purpose.

The landlord is willing to agree with *A.* to grant him a renewal at the expiration of the present lease; but the question arises, "whether *B.* will be entitled to any interest in the new lease, at the winding up of the partnership concerns?"

J. D. S.

STAMP DUTIES.—LAWYER'S CERTIFICATE.

I shall complete my articles at the age of nineteen, and, according to the present regu

lation, shall not be admitted until twenty-one. I beg to ask your correspondent G. whether he considers that my right to paying only one half of the duty on my certificate for the first two years, *after having been admitted*, has been prejudiced by the fact of my having been out of my time *two years previously* to the possibility of my being admitted; or whether I shall be able to obtain my certificate for the first two years at 4*l*.? A REFORMER.

Birmingham.

STAYING PROCEEDINGS.—NON PROS.

A. issues a writ against *B.*; but, before the return, *B.* takes out a summons and obtains an order for the particulars of the demand, and a stay of proceedings till the particulars are delivered. Three or four terms elapse without *B.* hearing any more of the matter. Is there any mode of making *A.* either deliver particulars, or suffer judgment by *non pros.*? D. O.

MISCELLANEA.

LORD NORTHINGTON—CHIEF JUSTICE WILLES.

IMMEDIATELY after Willes had refused the seals, Henley called upon him at his villa, and found him walking in his garden, highly indignant at the affront which he considered he had received in an offer so inadequate to his pretensions. After entering into some detail of his grievances, he concluded by asking whether any man of spirit could, under such circumstances, have taken the seals, adding, "Would you, Mr. Attorney, have done so?" Henley, thus appealed to, gravely told him that it was too late to enter into such a discussion, as he was then waiting upon his lordship to inform him that he had actually accepted them.—*Lord Henley's Life of Lord Northington.*

LORD NORTHINGTON.

Like most men of that day, Lord Northington had, in his youth, enjoyed the pleasures of the table; but many a severe fit of gout was the result of his early indulgences. When suffering from its effects, he was once overheard in the House of Lords to mutter, after some painful walks between the woolsack and the bar, "If I had known that these legs were one day to carry a Chancellor, I'd have taken better care of them when I was a lad."—*Lord Henley's Life of Lord Northington.*

ANTIQUITIES OF THE INNS OF COURT AND CHANCERY.

These inns, or hostels (says Herbert), as they were anciently called, were, from their first institution, divided into two sorts, denominated inns of court, and inns of chancery. The former were so named from the students in them being to serve the courts of judicature, or because these houses anciently received the sons of noblemen and the better sort of gentlemen; so that these hostels being nurseries or seminaries of the court, taking their denomination of the end wherefore they were instituted, were called inns of court.

The latter were called inns of chancery, probably because they were appropriated to such clerks as chiefly studied the forming of writs, which was the province of the cursitors. "An additional evidence is afforded (says Dugdale), that the inns of chancery were so called, because they were anciently hospicia for the clerks of chancery, if we allow that inn of chancery situate near St. Andrew's Church, in Holborn, now denominated Davyes or Thavyes Inn, to be the same which is mentioned in the fine roll of 2 Edward 3., which is very probable, considering the little difference in pronunciation betwixt Travers and Thavyes."

The study of the law being anciently held in high estimation, the inns of court, as the chief schools for that study, were then only accessible to men of rank and fortune.

Ferne, formerly a student in the Inner Temple, in his treatise entitled "The Glory of Generosity," expresses himself to the same purpose.

"Nobleness of blood, joined with virtue, counteth the person as most meet to the enterprising of any public service, and for that cause it was not for nought that our ancient governors in this land did, with a special foresight and wisdom, provide that none should be admitted into the houses of court, being seminaries sending forth men apt to the government of justice, except he were a gentleman of blood; and that this may seem a truth, I myself have seen a calendar of all those which were together in the society of one of the same houses, about the last year of king Henry the Fifth, with the arms of their house and family marshalled by their names; and I assure you the selfsame monument doth both approve them all to be gentlemen of perfect descents."

In the time of Fortescue, who was chief justice of the King's Bench in the reign of Henry the Sixth, the inns of court or hostels flourished, for there were then belonging to the lawyers' university, he tells us, "four inns of court, the same now in being, each containing two hundred persons; and ten inns of Chancery, and in each of them one hundred persons." This was two more than at present, there being now but eight, and of those only one of the same which were then, *viz.* Clifford's Inn.

There is a tradition, says Dugdale, "that in times past there was one inn of court at Dowgate, called Johnson's Inn: another in Fewter Lane; and another in Paternoster Row, which last is endeavoured to be proved because it was next to St. Paul's church, where each lawyer and serjeant at his pillar heard his client's cause, and took notes thereof upon his knee; and after the serjeants' feast ended, they do still go to St, Paul's in their habits, and there choose their pillar whereat to hear their client's cause, if any come, in memory of that old custom." But if we may rely on Sir John Fortescue, this tradition will prove a mere conceit, for he tells us that the inns of court and chancery were then, as they are now, "placed out of the city and noise thereof, in the suburbs of London." "Situatur etiam studium illud locum curiarum illarum, et civitatem Londini," &c.

The number of these inns, and their ancient state and ceremonies, are more circumstantially detailed by Stow.

The Legal Observer.

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> ——— "Quod magis ad nos
> Pertinet, et nescire malum est, agitamus."
>
> HORAT.

LAWYERS IN THE NEW PARLIAMENT.

THE Parliament, which is soon about to assemble, and to whose consideration is to be committed the momentous question which now agitates the country, will not lie under the reproach of being a parliament without lawyers, or, as Lord Coke would have called it, "*indoctum parliamentum*, whereat no good law was ever made." The profession have not remained unconcerned spectators of the conflict; they have all joined in the fight on one side or the other; and not a few of them have headed a legion, and led it on with success. When the lists shall appear, all the well-known names which are familiar to the country as household words, will be found ready again to enter upon this hard foughten field of discussion, assisted by many who will for the first time assert their right to be heard.

At this time, when each host is gradually assembling its might, let us recapitulate their leaders, and endeavour to discover the probable result of the strife, confining our attention to our own profession, and the constitutional means of gaining the victory.

All petty political distinctions are now for the time annihilated. This is no moment to discuss the *minutiæ* of a candidate's faith. Questions which would be in every one's mouth at any other time, have now lost their interest. All other matters are merged in the one subject, of REFORM or NO REFORM. "Are you a reformer?" "Did you support the bill?" "Will you support the bill?" These are the eager questions which have been asked on every hustings in the three kingdoms; and when they are answered, the political catechism is finished.

The well-known leaders are already returned. Sir *Charles Wetherell* is undoubtedly the first on one side. He stands forward as the long-tried opponent of all measures of the "scale and order" of the reform bill. His is no trifling or petty warfare: he scorns to have recourse to tactics or stratagems; he meets the enemy boldly and directly; he assails him in his most powerful points, and lays close siege to his strongest citadel; he is always a fair and manly opponent; and although his forces are somewhat unwieldy and discursive, yet he maintains the fight with great courage and steadfastness, and not unfrequently with success.

Close following to him, comes Sir *Edward Sugden*, who has hardly as yet acquired the perfect confidence of his present party. His forces are compact and regular; his course steady and confident. He seems to disdain all opposition, and already to exult in his victory. He does not, however, permit this seeming disregard of his opponents to carry him too far, or to expose him to any sudden attack. He will maintain the field inch by inch, and will not disdain, if necessary, to resort to all lawful artifices which may secure success to his cause.

On the other side, the *Attorney-General* adds dignity to the cause he espouses. Calm, collected, and reposing on his own strength, he waits the coming enemy. He will soon, however, rouse all his energies, and awaken his dormant thunder. It must be admitted that he is a powerful opponent.

Still fresh in his duties in the House of Commons, but undoubtedly next to the Attorney-General, comes the *Solicitor*. He has shown no want of boldness or energy in asserting the tenets of his party on this question, and he will probably be as forward on the present occasion.

These are the most forward of the combatants on either side; but there are many others worthy of mention.

Sir *James Scarlett* appears, the shrewd and able advocate of things as they are, and clothed in that happy garment of self-satisfaction which renders all times an

changes the same to him. Opposed to him, however, will be Mr. *Campbell*, his son-in-law by marriage, but his very son in quality of mind: equally shrewd, nearly equally experienced, and flushed with the hope of more decided official success than his father-in-law. Thus well have father and son managed like the Scotch rebels of old; that one portion of the family, at least, should side with those in power.

These are the leaders of the host —

" In strength each armed hand
" A legion, led in fight; yet leader seems
" Each warrior single as in chief; expert
" When to advance or stand, or turn the sway
" Of battle,—open when, and when to close
" The ridges of grim war."

There are yet, however, many others, who at least must be mentioned. Mr. *Spence*, although he has not spoken, is well entitled to be heard, from his exertions for law reform. To him be Mr. *Horace Twiss* assigned; that is, if Mr. *Horace Twiss* be returned. Mr. *Macaulay* and Mr. *Praed*, long friends and coadjutors out of the house, now find themselves opposed to each other. Let them, then, fight it out together. To Mr. *John Williams* we cannot assign any fitting opponent, unless it be Mr. *Clinton*. Mr. *John Wood*'s pretensions as a radical will hardly allow us to name him as a lawyer; but he will no doubt be ready in his place.

These are the former combatants; but in the new parliament we shall find some others, who, although they are new to the House, are not unknown elsewhere. On the one side, Mr. Serjeant *Wilde*, flushed with his recent triumph, more dear from having been so long delayed, will not be satisfied to remain a silent member. On the other the finished periods of Mr. *Frederick Pollock* will probably, neither in his own opinion nor in that of his friends, seem unsuited to secure parliamentary success. They are, perhaps, nearly of equal importance, and are thus well matched. Mr. *William Brougham* also,

(——" quantum mutatus ab illo
" Hectore, qui redit exuvias indutus Achilli!")

has promised the good people of Southwark that he will not remain quiet; and Mr. *Godson* will probably be desirous of showing the mighty deeds that the leader of a quarter sessions can perform.

The new member, who, in our opinion, is most likely to distinguish himself, is Mr. *Knight*. His imposing delivery and flowing diction, his readiness and imagination, will, if we mistake not, make some impression on that house of critics, which is so difficult to please, from the circumstance that each critic is an actor in his turn. He is returned against the bill, and will easily demolish the two last named advocates of reform.

These are the persons of our profession to whom this great question is intrusted. It will be seen that the parties are pretty nearly matched. It is now undisputed, that the ministers will command a considerable majority in the Lower House. Should the bill, however, in any of its stages be thrown out, either by fair and straightforward opposition, or, which is more probable, by the parliamentary tactics of its opponents, the situation of the ministry, we may say of the country, will be peculiarly distressing. The Tories are avowedly the foes of the measure, the Whigs not immediately connected with the administration are either openly opposed to it, or are very lukewarm in its success: the ministers and the PEOPLE are undoubtedly for it. This has been shown wherever it can be shown. Take as instances (among a thousand that might be given) the expression of the united feelings of the city of London, the defeat of the club of Mr. Hart Davis at Bristol, the interruption of the polling at Carmarthen, the election of Serjeant Wilde at Newark, the defeat of General Gascoyne at Liverpool, the retirement of Sir E. Knatchbull from Kent, the certain return of four members for Yorkshire, and of two for Devonshire; in short, the returns from all the counties of England.

These elections sufficiently show that the people are for the bill, and that they can express their opinion by the House of Commons as at present constituted; which fact, by the by, will place the supporters of the bill in a little *dilemma*.

If the bill, however, be thrown out, either by the House of Commons or the House of Lords, the king, the ministers, and the people, stand in direct opposition to the aristocracy. A hint has been given by the Attorney-General, that, in such an event, a new parliament will be summoned, and that writs will not be sent to the close boroughs. We think, however, that no minister dare give his sovereign such advice — certainly, if it can only be defended by a reference to the practice of the thirteenth or fourteenth centuries. We hope and believe, that recourse will not be had to a proceeding so dangerous and arbitrary. No; if it be thrown out, and there be no second dissolution, which is hardly to be expected, let a new ministry be formed, and let that ministry be opposed by all fair means. This is not a measure, the deferring of which can

be attended with any sensible evil; nay, it is better, perhaps, that it should be deferred, that it may eventually be passed with the greater deliberation, that its real nature and effect may be more completely ascertained, and that no disappointment be experienced when it shall come into operation.

The House of Peers, however, it is now generally believed, will not oppose the bill, if it pass the other House by a large majority; and, if this be the case, it may very well be carried through both Houses in the approaching summer sessions, and a new appeal be made to the country in the autumn. We have studiously given no opinion on the merits of the bill; we have merely endeavoured to state the precise state of the question: we may, however, be permitted to say, that however well satisfied members may be with the principle of the bill, it behoves them scrupulously to examine its details; for they may rest assured, that if it stands in its present shape when it comes into operation, it will bring upon the country no little disappointment and confusion.

THE UNIVERSITY OF LONDON LAW CLASS.

LECTURES OF MR. THEOBALD ON THE LAW OF PRINCIPAL AND SURETY.

(Continued.)

No. IV.

Of the Manner in which the Obligation of Surety may be extinguished.

If the surety becomes liable as principal debtor, he ceases to be liable as surety. One man may be engaged in different ways for the same thing, as by bond and by simple contract, but he cannot be his own surety; this rule was recognised by judicial authority in *Thomas, Assignee of Eaton*, v. *Da Costa*.[a] There the defendant had guaranteed Eaton, that the firm of Rietti and Co. at Jamaica, then consisting of Rietti and Sadler, should sell to the best advantage the goods which Eaton might consign to them. Sadler went out of the firm, and the defendant entered it in his stead; "from which moment," said *Gibbs* C.J., "there was an end of the guarantee, as he had become a partner with Rietti, and was therefore personally responsible."

The obligation of a surety is also discharged by the creditor's failing to perform, or disabling himself to perform, any or either of the express or implied obligations which he is under towards the surety or the principal debtor; as for instance, by his failing to perform any part of the consideration; by his giving up, or losing through neglect, securities which he might have applied in discharge of the debt, or in exoneration or indemnification of the surety; by the concealment from the surety of any of the terms of the principal contract, or of any material fact connected with it, from which his risk is greater than, in consequence of the concealment, he had reason to suppose it to be. In illustration of these various causes of discharge Mr. Theobald cited numerous cases.

In *Glyn* v. *Hertel*[b] the action was brought on the following guarantee:— "Gentlemen,—I have to offer you my guarantee for the transactions in the account of Spitta and Co. with your house to the extent of 5000*l*." It was described in the declaration as a guarantee for a loan to be advanced by the plaintiffs to Spitta and Co. The evidence at the trial was, that at the time the guarantee was given Spitta and Co. were indebted to the plaintiffs a considerable sum of money, for which the plaintiffs held a promissory note of which Spitta and Co. were the makers, and some bills, as a security; and that on receiving the guarantee, the plaintiffs cancelled the note and delivered up the bills, but the bills, with a new promissory note, were immediately delivered back to them, and no money was advanced on the occasion. This transaction was considered by the Court not to amount to a loan, and therefore, it not being a performance of the consideration, the defendant was held not liable.

So, in *Evans* v. *Whyle*[c], where the defendant guaranteed the plaintiff to the extent of 50*l*. for the price of gold to be supplied to Evan Evans, a working goldsmith, in the course of his business, the Court was of opinion, that the guarantee applied only to gold supplied by way of sale; and as it appeared that the gold for the price of which the action was brought was paid, together with money, for certain bills of exchange, which the principal debtor transferred to the plaintiff without his indorsement, the Court, considering this not a sale of the gold, but a payment of it upon the purchase of the bills, held the defendant not liable.

[a] 2 J. B. Moore, 586.

[b] 5 Bing. 485. Taunt. 208.

In *Holl* v. *Hadley*[d], the plaintiffs declared on a guarantee for coals to be supplied to the defendant's brother on a credit of two months from the delivery. The plaintiff's witness who was called to prove the delivery, stated, that the coals were delivered according to the custom of the trade, which was, that a portion had been delivered daily for a month; and on the last day of the month, the dealer gave a bill at two months for the price of the whole supply in the course of that month; so that, in fact, the credit given was a credit of three months from the time of the delivery as to such as were supplied on the first day of the month, and of more than two months as to all the rest, excepting those delivered on the last day of the month; and this was held not to be a performance of the stipulation for two months' credit, so as to charge the surety.

In illustration of the rule that the surety is discharged by the nonperformance or failure of any condition or contingency stipulated, the cases of *Montague* v. *Tidscombe*[e], *Elworthy* v. *Maunder*[g], *Johnson* v. *Baker*[h], *Campbell* v. *French*[i] (in error), were cited. In *Montague* v. *Tidscombe*, the plaintiffs, executors, had been sued at law by the defendants, on a bond of their testator, conditioned for the fidelity of the testator's son as an apprentice to the defendants. At the time the testator entered into the bond, the defendants covenanted with him, at least once a month to see the apprentice make up his cash. The apprentice embezzled a considerable sum of money; and the plaintiffs sought relief from the bond, on the ground that the defendants had not performed their covenant. And the Lord Chancellor being of opinion, that the covenant meant that the defendants should see not only to the casting up of the cash, that it was right in figures, but see the cash made up also, which they had not done, decreed that the plaintiffs should be answerable for no more than the defendants could prove the apprentice to have embezzled during the first month after the embezzlement began.

In *Campbell* v. *French*, a case in error from the Common Pleas to the King's Bench, the Common Pleas had held, that what they called a substantial performance of the condition was sufficient to charge the party; but the King's Bench reversed that judgment, holding a literal performance, in case it was possible, necessary. The question was, whether a condition, that the bills for which the plaintiff in error was engaged as surety, should, if not paid at Bombay, be returned duly protested for want of payment, was performed by a protest only for want of acceptance; and the Court in error, holding it not, adjudged the plaintiff to be discharged from his obligation.

In *Bulkeley* v. *Lord*[j], the plaintiff, an insurance broker, having refused to effect an insurance under an apprehension that the proposed insurer would become bankrupt and not pay the premium, the defendant, father of the latter, guaranteed the plaintiff from any loss should such bankruptcy take place: the plaintiff proved that the insurer had committed an act of bankruptcy; and he proved a debt sufficient to support a petition; but no commission had issued, and *Abbott* C.J. nonsuited the plaintiff.

If the creditor parts with any fund, or securities, the property of the debtor, which the creditor would be entitled to apply in discharge of the debt, he cannot afterwards resort to the surety; a rule which seems founded in the following reason: — That securities which the creditor is entitled to apply in discharge of the debt, he is bound so to apply in favour of the surety; and his breach of this, as of any other obligation, discharges the surety. Thus, in *Law* v. *East India Company*[k], the plaintiff was a surety for William Tierney, as military paymaster of the Company; and after Tierney's death, the Company had paid over to his administrator money in their hands, which they might have applied as a set-off to what was due to them from him; and on this account the Master of the Rolls (Sir W. Grant) relieved the surety; "for," said this illustrious Judge, "it cannot be contended, on any principle which prevails with regard to principal and surety, that where the principal has left a sufficient fund in the hands of the obligee, and he thinks fit, instead of retaining it in his hands, to pay it back to the principal, the surety can ever be called on.

In like manner, in *Butler* v. *Capel*[l], the creditor having neglected to procure a part of the securities intended to have been taken from the principal, the surety was held to be partially discharged, that is, to the extent of the value of the security lost.

The surety is not liable, if any of the terms of the principal contract are con-

[d] 5 Bing. 54. See also *Bacon* v. *Chesney*, 2 Stark. N. P. C. 192.
[e] 2 Vern. 518.
[g] 5 Bing. 295.
[h] 4 Barn. & Ald. 440.
[i] 6 T. R. 200. 2 H. Black. 163.
[j] 2 Stark. N. P. C. 406.
[k] 4 Vesey, 824.
[l] 2 Sim. & S. 457.

cealed from him. Thus, if upon a mercantile contract the surety is not informed of the price of the goods for which he has made himself answerable as surety, the market price is understood; and any private bargain between the creditor and principal for a higher price will discharge the surety.[m]

In most cases, said Mr. Theobald, the execution of an agreement raises an obligation to some extent, or of some kind, against the other principal party: but sureties are obliged by force of their engagement only; and if the instrument of their engagement is void, the engagement is a nullity. Thus, where a recognizance was void, being taken during the period of the commonwealth, and it happened not to be within the Convention Act, the Lord Keeper refused to set up the recognizance against the surety, and would not, the reporter adds, allow it to be so much as a debt.[n] In like manner, where an annuity bond became void by the neglect of the grantee to register a memorial, the grantee was held not entitled to recover back any part of the consideration money from the surety, though he had joined his principal in a receipt for it.[o] *Williamson* v. *Goold*[p] seems opposed to the principle contained in the above, and would therefore appear to be wrongly decided.

The breach, by the creditor, of a mere revenue regulation, which has not the effect of discharging the principal, will also not discharge the surety.[q]

Mr. Theobald, in conclusion, announced for his next lecture, the discussion of several doubtful questions as to the discharge of the surety; and next, of the remedies which the surety has against his principal.

MEDICAL JURISPRUDENCE.
No. II.

EFFECTS OF BURNING ON THE HUMAN BODY.

THE following cases, and the accompanying remarks, which we abridge from the Edinburgh Medical and Surgical Journal, will be highly interesting to the medical jurist, and may be serviceable to every criminal lawyer.

1. The first was the case of a man named Gilchrist, who was condemned and executed. This case happened at Glasgow.

The prisoner and his wife lived on tolerable good terms, but used to take fits of rambling, and get drunk for days together. At last, on one of these occasions, after their return home in the evening, the people who lived in the floor above them heard a noise like that of two persons struggling, and soon afterwards a rattling or gurgling, and moaning, as of one choking, or bleeding to death. They so strongly suspected all was not right, that they called down to Gilchrist through the floor, that they were afraid he was killing his wife. In no long time they were further alarmed by the smell of fire and the filling of the house with smoke; upon which they went down to Gilchrist's apartment and demanded admission. After some delay he admitted them, and in doing so appeared to them to have come out of an inner room, where he said he had been asleep in bed. On letting them in he stumbled over the body of his wife, who lay in the outer apartment, quite dead, kneeling before a chair, and very much burnt.

In these circumstances, the prisoner was accused of having murdered her, and then burnt the body to conceal the manner of death; while, on the contrary, he alleged he had gone to bed tired, and knew nothing of what had befallen her till he was awaked by his neighbours; and that he presumed her clothes had caught fire while she was intoxicated, and burnt her to death.

"Unfortunately," observes Dr. Duncan in his notes, "there were no data to decide this question. The medical gentlemen who had been appointed to examine the body merely reported that they found the body so much burnt that they could learn nothing from it as to the cause of death. The general evidence was all against the prisoner. He was accordingly condemned, although the precise manner of his wife's death was not proved even presumptively; and the sentence was put in execution; but to the very last he vehemently and solemnly denied that he was guilty."

2. It is singular, that within a year Dr. Duncan had an opportunity of applying these views in a similar judicial case, which occurred at Leith.

The general evidence was of the same nature as in the case of Gilchrist, but even stronger against the prisoner. He lived on bad terms with his wife. On the evening of her death she returned home at a late hour with a lighted candle, after getting some whisky at a neighbour's. At this time the prisoner was in bed; but some time afterwards there was heard a considerable noise, like that of struggling and of chairs pushed up and down the room; and after this the man was heard in an adjoining bedroom endeavouring to quiet his child, who was crying.

Presently the neighbours were alarmed by a strong smell of fire proceeding from the prisoner's apartments. They therefore knocked at his door for admission; but in vain: all the noise they could make did not bring him to the door. At last a man forced his way in by breaking the window of the outer room. On entering, he found the room full of smoke, and observed something burning red in a corner, over which he instantly threw a pitcher of water, and which proved to be the body of the woman burning on the hearth. Several persons now entered the inner room, where they found the prisoner eithe

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[m] *Pidcock* v. *Bishop*, 3 Barn. & Cres. 605.
[n] *Sheffield* v. *Castleton*, 2 Vern. 393.
[o] *Stratton* v. *Rastal*, 2 T. R. 366.
[p] 1 Bing. 274. 316.
[q] *Brown* v. *Duncan*, 10 Barn. & Cres. 59.

asleep or feigning to be so. On being roused and told of his wife's death, he expressed neither surprise nor sorrow, but coolly demanded by what authority his neighbours broke into his house, and threatened to send for a constable to commit them. Under such circumstances, the presumption of his having been accessary to his wife's death was strong.

The dead body was examined under the Sheriff's warrant, and Dr. Duncan was present. "We found," says he, "some parts of the body, especially the belly, burnt to a cinder. It was not there we could expect to find any proof whether the burning had been before or after death: the action of the fire had been too violent. We then examined the parts on which it had acted more moderately, namely, the face and extremities; and here we discovered what we were unanimous in considering to be incontestible proof that the woman had been burnt to death—that she had been set fire to while alive, and had died in consequence of the burning. There was every mark of vital re-action; some spots merely red and inflamed; others scorched to a hard transparent crust, but surrounded with distinct redness; and a great many blisters filled with lymph, perfectly different from those produced on the dead body, which are not filled with a fluid, but with air or vapour. In short, we found appearances exactly similar to those of fire on a living body; and therefore we reported, as our unanimous opinion, that the deceased was burnt to death."

As there was no proof that the prisoner had set fire to her, he was not found guilty; but in consequence of the extremely suspicious nature of the general evidence, and especially the circumstance of the man apparently pretending to sleep in defiance of his neighbours' attempts to awake him with loud knocking, the jury returned the intermediate verdict of *not proven*.

"I think," continues Dr. Duncan, "that in the last case, and probably also in the first, the woman was burnt to death. One circumstance worthy of particular notice occurred in both; I allude to the violent and destructive action of fire, compared with the small quantity of combustible matter consumed. In both cases these unfortunate women were burnt to death, and their bodies deeply scorched by their clothes alone; for in neither was there any trace of burning in the house or furniture. I examined the last case on the spot. The woman was found on the hearth with part of her clothes unburnt, and a chair, from which she had fallen, quite entire. She was dead when the neighbours entered, and in the dark the body was discovered by a red light issuing from it."

Observations by Dr. Christison.—This interesting narrative gives rise to various reflections. In the first place, I think it is extremely difficult to avoid the conclusion that the body was in that singular state in which it is apt to undergo spontaneous combustion, or I should rather say, to be preternaturally combustible. It is difficult to explain otherwise the great extent of the burn which was inflicted. Secondly, "although," says Dr. Christison, "the subsequent experiments will show that Dr. Duncan was perfectly right in his opinion, and the grounds on which he rested it, an important question arises, and was indeed very ingeniously started by the Crown counsel at the trial, in reference to the opinion that the woman was burnt to death—whether the redness and blisters remarked on the edge of the scorched parts might not have arisen immediately after strangling, or some other cause of death than burning, during the period when a lingering vitality remains in the body, and when undoubtedly certain phenomena of a vital nature are frequently observed. The medical witnesses at the trial admitted that the question could not be answered decisively, on account of the want of the necessary facts; but that they did not consider it at all probable that blisters, at least, could be produced even immediately after death. It will be seen presently that they were right in regard to both blisters and redness. Thirdly, as to the prisoner not being awakened by the noise of the neighbours, which even Dr. Duncan was disposed to consider suspicious, I have to observe, that, from what has come under my own observation, this circumstance cannot be considered evidence against the man. Those who have not had their attention called accidentally to the matter, will scarcely believe how profoundly some persons sleep, more especially working people after their day's labour is over. I have met with an instance where the loudest noise I could make at a door and window close to the bed where the sleeper lay did not rouse him; and a boy of my acquaintance, after a long excursion one day, not only slept out all the noise his family could make at his bedroom door, which he had locked inside, but literally continued to sleep, till his father, in a state of alarm, cut out a panel of the door with an axe, and entering the room, shook him by the shoulders.

In an enquiry into the criterions by which a burn inflicted during life may be distinguished from one produced after death, the following considerations must be kept in view. 1. What are the phenomena of vital re-action which appear immediately after the infliction of a burn during life, and remain after death? 2. Do these phenomena appear in every instance of severe burning, even when the person survives but a few minutes, or a single minute? 3. Can they be produced or imitated by any of the effects of burning produced immmediately after life is extinct? Such are the points I propose to settle in the succeeding investigation.

1. and 2. Of the effects which follow the application of heat to the living body, the most immediate is a blush of redness to a considerable extent around the burnt part—removable by gentle pressure—disappearing in no long time—and not permanent after death. Next to this in order, and occurring indeed most generally at the very same time, is a narrow line of deep redness, separated from the burnt part by a stripe of dead whiteness—bounded towards the white stripe by an abrupt line of demarcation—passing at its outer edge, by insensible degrees, into the diffuse blush already described, but not capable of being removed, like it, by moderate pressure. This line of redness may be seen very distinctly after the application of the actual cautery, the immediate effects of which

represent exactly what may be looked for in a case of speedy death by burning. The redness is obviously caused either by extravasation, or very minute capillary injection of the true skin. In every instance in which I have watched the effects of the actual cautery, as well as in the cases which have been observed at my request by others, it appeared in a very few seconds; sometimes in five, generally within fifteen, and once only so late as thirty seconds. I mean, that in this short space of time, the inner edge of the redness surrounding the cauterised part was deep crimson, and incapable of being removed by pressure. I have further examined carefully this appearance in the bodies of persons burnt a few hours before death, and never failed to observe it, forming a line on the entire skin near the burn, from a quarter to half an inch in breadth, and about half an inch from the burn. The next appearance in point of order is blistering. I have not been able to determine the usual period at which blisters are formed. But from the observations I have made, it is obviously an uncertain consequence of a burn, if life be extinguished a few minutes afterwards. When the burning body is a scalding fluid, blisters generally appear in a very few minutes; yet sometimes, in very extensive burns of this kind, especially in young children, there is no vesication at all even in many hours. When the burning cause is an incandescent body, vesication is by no means so invariable a consequence as might be supposed. For example, it is seldom witnessed at all round the edge of a burn produced by the actual cautery, probably on account of the circumscribed manner of applying the heat. At the same time, it is certainly often observed very soon after an ordinary burn, such as arises from the clothes catching fire; and the case of the woman in the second trial proves that it may occur even when the individual is burnt to death on the spot, and consequently does not survive the burn many minutes. The other vital consequences of burns ensue at too remote a period to be of any use for the object now in view.

3. *It follows, then, that the only effects of burns which appear immediately after the injury, and remain in the body, are,* first, *a narrow line of redness near the burn, not removable by pressure; and,* secondly, *blisters filled with serum: that the former is an invariable effect, but that the latter is not always observable when death follows the burn in a few minutes.*

Before these appearances can be assumed as indicating that the burn was inflicted during life, it remains to be enquired whether they can be produced or imitated immediately after death, while vitality still lingers in the body, or (to use Bichât's phrase) while organic vitality survives the extinction of animal life. For this end the following experiments were instituted, partly by myself, partly by my friends at my request. In every instance the appearances are described from my personal inspection: —

Experiment 1st.—In a stout young man, who poisoned himself with laudanum, a very hot poker and a stream of boiling water were applied to the skin of the chest and inside of the arm one hour after death. Next day no blisters or redness were visible on or near the burns. At the parts burnt with scalding water, the cuticle appeared as if ruffled, and could be very easily rubbed off; but there was not a trace of moisture on the true skin beneath. At the parts burnt with the poker, the whole thickness of the skin was dried up, brownish, and translucent, but entirely free of redness or blisterings on or around them.

Experiment 2d. — A stout young woman died in ten or twelve days of a low typhoid fever, and at her death was but little attenuated. Ten minutes after death, boiling water was poured in a continuous stream on the breast and outside of one of the legs. The body was examined in a day and a half. On the leg, no trace whatever could be discovered of the action of heat. On the breast, the place where the water had been poured on it was of a very pale brownish hue, the cuticle slightly shrivelled, dry, brittle, and easily scratched off. The surface of the true skin below was dry; and around the burnt part there was not a vestige of redness or blistering. In this instance the heat was applied so soon after death, that the gentleman who applied it felt convinced he observed the chest heave up when the hot water was poured on it.

Experiment 3d. — A very powerful athletic young man poisoned himself with laudanum; and, although the stomach-pump was successfully applied not many hours after he had swallowed it, continued completely comatose, and without any sign of sensibility under the ordinary stimulants. Four hours before death, a tin vessel, filled with boiling water, was applied on several parts of the arms; and a hot smoothing-iron was held on the outside of the hip-joint. Half an hour after death, a red-hot poker was applied to three places on the inside of the arm. The body was examined in thirty-eight hours.

Some of the spots burnt during life presented a uniform blister filled with serum. On two there was no blister; but the cuticle was gone, and the true skin dried into a reddish translucent membrane, at the edge of which there were drops of serum, and also particles of the same fluid dried by evaporation. Round all these spots there was more or less scarlet redness, particularly round the two spots last mentioned. A bright red border, half an inch wide, surrounded the whole burns; and the redness was not in the slightest degree diminished by firm pressure. The spots burnt after death were some of them charred on the surface and not elevated; two presented vesications, but the blisters were filled with air; the cuticle over them was dry and cracked, and the surface of the true skin beneath was also quite dry. On the white parts of the skin there was no adjacent redness. At a part of the edge of two of the burns, however, the lividity which appeared on this, as on most dead bodies, approached very near the margin; but the discoloration could be almost entirely removed by moderate pressure continued for a minute.

Experiment 4th. — Half an hour after amputation of a leg, a cauterising iron was applied to

it. Around the cauterised part whiteness and dryness were produced, but no redness or vesication.

Experiment 5th. — Two hours after death, subsequent to amputation of the arm, a cauterising iron was applied to the remaining arm. The appearances were the same as in the last experiment.

Experiment 6th. — Ten minutes after the amputation of a leg, a cauterising iron was applied to it. The effects were the same as in the fourth experiment, except that blisters were formed round the burn; dry, however, and filled with air.

From these experiments it appears that the application of heat to the body even a few minutes only after death, cannot produce any of the signs of vital re-action formerly described. It farther appears, that the lividity which follows death in most instances may assume such an arrangement as to imitate the red border produced by a burn during life. But an experienced person can easily recognise the appearance put on by lividity; and if its general appearance should not serve to characterise it, it may at once be known by the effect of continued moderate pressure in removing the redness. It should be understood, then, that, so far as the preceding experiments go, a line of redness near the burn, not removable by pressure, and likewise the formation of blisters filled with serum, are certain signs of a burn inflicted during life.

PRACTICAL POINTS.
No. II.

ON THE VALIDITY OF AN I. O. U.

NOTHING is more frequent in matters of business between all sorts of persons, than to resort to an I. O. U.; but until very lately considerable doubt had rested on their validity, without a stamp; and if they were to be stamped, a fresh doubt arose as to the proper stamp to be affixed to them.

In *Gray* v. *Harris*, sittings after Easter term 1800, cited in Chitty on Bills, 243 n. Lord *Eldon* C. J. is said to have held, that an I. O. U. could not be received in evidence without a stamp, being a promissory note, though not negotiable. In *Fisher* v. *Leslie*, 1796, 1 Esp. 426., however, Lord *Ellenborough* clearly held, that an I. O. U. did not require a stamp, and might be recovered, and an action of *assumpsit* might be maintained on it. Lord *Tenterden* has lately decided in the same way, as appears by the following case, *Payne* v. *Jenkins*, 4 C. & P. 324.

This was an action on an I. O. U. for 6*l.* 10*s.*; and it was opened, that the plaintiff, being the owner of an Arabian mare, the defendant gave 25*l.* in cash and this I. O. U. as the price of one half share of this animal. A witness called for the plaintiff stated, that the defendant admitted the I. O. U. to be his, but said he had paid enough for the mare. In his cross-examination this witness stated, that there was a written agreement between the plaintiff and the defendant for a partnership in this mare, and that this I. O. U. was part of the price paid for the defendant's share; the mare, before that partnership, having been the sole property of the plaintiff. The I. O. U., which was not stamped, was in the following form: — "I. O. U. 6*l.* 10*s.* William Jenkins."

Campbell, for the defendant. — An I. O. U. is a mere acknowledgment; and as it appears that this I. O. U. was given for money to be paid under a written agreement, that agreement ought to be produced. Another objection is, that there is no special count in the declaration; and I submit that an I. O. U. is not applicable to any of the common counts.

Lord *Tenterden* C. J. — There is a count upon an account stated.

Campbell. — I submit that an I. O. U. alone will not support an account stated; more especially in this case, where it appears to be coupled with a written agreement.

Lord *Tenterden* C. J. — An I. O. U. has been admitted on the account stated a great many times. The written agreement has nothing to do with it. He gives this as the price of becoming a partner; he pays it for having the written agreement.*

REGISTRY OF DEEDS FOR MIDDLESEX.

WE have received several hints, that we have neglected to observe upon some defects, not to say *abuses*, which prevail at the Registry Office for the county of Middlesex. The indices are always greatly in arrear, and consequently much time is lost and inconvenience sustained by the profession in searching for the memorials of deeds, and ascertaining the extent of existing incumbrances.

In the next place, the only time during which the witnesses to deeds can be sworn to their execution, is for a single hour in the day; from twelve till one. Such a rule might not be very objectionable when there were few memorials; but it is now mani-

* See also *Israel* v. *Israel*, 1 Camp. 499.; *Tomkins* v. *Ashby*, 6 B. & C. 541., S. C. 1 Moo. & Mal. 32.; *Mullet* v. *Hutchison*, 7 B. & C. 639.; *Langdon* v. *Wilson*, 7 B. & C. 640., S. C. 2 M. & R. 10.; *Maugham* v. *Hubbard*, 10 B. & C. 14.; *Welland* v. *Moss*, 1 Bing. 134., S. C. 7 J. B. Moo. 503.

festly injurious to the public and the profession, and ought to be altered. The Masters in Chancery attend to administer oaths for three hours in the morning; and in term, and during the seals, for two hours in the evening. The duty of the registrar being performed by deputy, the accommodation of the parties and their solicitors might the more easily be effected; and three hours in the day would certainly not be a very oppressive labour in listening to the clerk's administration of the oath, or rather, in sitting in an inner room whilst the ceremony is performed outside the door.

We have also heard it observed, that the hours during which the office is open for the purpose of making searches are too few, and the holidays, when no information can be obtained (even by the payment of extra fees), are too many.

We should hope that the very respectable individuals who hold the several appointments in the Registry Office will see the propriety of removing the cause of these complaints, and prevent the necessity of calling attention to them in a more decided way than at present may be necessary.

IMPRISONMENT FOR DEBT.

ENQUIRIES OF THE COMMON LAW COMMISSIONERS.

We are just put in possession of the questions proposed by the Common Law Commissioners, regarding *imprisonment for debt;* and at the earliest opportunity we intend to discuss the general policy of this mode of remedy, and the modifications in practice which it may be expedient to adopt.

The Commissioners have directed their enquiries to *final* as well as *mesne* process, but we shall, on this occasion, confine ourselves to the latter.

MESNE PROCESS.

1. In cases where you are employed to recover debts, for which the debtor may be held to bail, do you usually proceed by bailable or serviceable process? And what is the proportion of the one to the other?

2. What are the circumstances that induce you to issue bailable in preference to serviceable process?

3. In particular, is bailable process usually resorted to, from apprehension that the debtor will abscond; or from the expectation that he will pay or settle the debt, to save his credit; or from what other motives?

4. Where bailable process is resorted to, in what stage of the proceedings is payment most frequently obtained?

5. Where the debt is paid or settled after arrest, in what proportion of cases is it paid or settled before perfecting bail above?

6. Where bail above is perfected, and the defendant pleads to the declaration, is the suit productive to the creditor in general, or otherwise?

7. In what stages of the cause, where the debt is recovered at all, is it most usually recovered, where the process is merely serviceable?

8. Are you aware of any instances, and are they frequent or otherwise, where the power of arrest on mesne process has been abused for vexatious purposes, either by arresting where no debt was due, or where less was due than the sum for which the debtor was arrested, or where the debt being due, the process was resorted to without sufficient cause?

9. Are you aware of any instances of inconvenience and loss of credit sustained by debtors who have been arrested, and who are solvent, but unable to procure bail? If you are, state them.

10. Do you know, or have you reason to believe, that debtors are frequently put to great expense, to obtain indulgence from sheriffs' officers, and persons employed to execute process, and that extortion is sometimes practised by officers on debtors in their custody?

11. Is the system of bail productive of perjury? and in what manner, according to your experience?

12. Does it, according to your experience, operate to encourage litigation and multiply suits? and in what manner.

13. Is it frequently attended with the inconvenience of subjecting relatives or friends, who have become bail, to the payment of the debt of the principal?

14. Do you, in these or any other respects, consider the right of arrest on mesne process as productive of hardship or oppression to the debtor.

15. Do you know any instances, and to what extent, where debtors on arrest have had recourse to the Insolvent Act, for the fraudulent purpose of withholding their property?

16. Are such frauds easily practised?

17. In your judgment, is the Insolvent Court effective for enforcing a fair distribution of the insolvent's property? or in what respects do you consider the proceeding defective?

18. Are arrests in some instances procured by debtors themselves for the purpose of obtaining the benefit of the Insolvent Act?

19. Do you consider the power of holding a debtor to bail on mesne process advantageous; and if so, in what respects? or do you consider it to be otherwise; and if so, for what reasons?

20. Do you think that it might be altered or modified with advantage as to the amount of the debt in respect of which the debtor may be held to bail?

Or by any limitation as to the nature of the debt?

Or by any limitation as to the class of persons subject to arrest?

Or the circumstances under which it ought to be allowed; such as the apprehension of a fraudulent removal by the debtor of his person or property, and by requiring some such special cause to be sworn to as a ground for arresting?

21. Can you suggest any other means of improving the present system of arrest on mesne process?

22. In your judgment, might process of attachment against the goods or other property of the debtor be conveniently substituted for process against the person, either absolutely or at the option of the creditor?

23. Do you think it desirable, in cases where the plaintiff has not thought proper to arrest a defendant in the first instance, to allow him a discretion of holding him to bail in a subsequent stage of the proceedings?

24. In your opinion, should a fraudulent removal of goods after judgment be punishable as a crime?

RECENT LEGAL APPOINTMENTS.

The following legal appointments have recently been made. Mr. Harvey, the son of the late Accountant General, has been made a Commissioner of Bankrupts; and Mr. Norton, having resigned his commissionership of Bankrupts, appointed a Police Magistrate. The commissionership of Mr. Gough is still vacant. Sir George Grey has been appointed Counsel to the Excise, in the place of Mr. Walton; and Mr. Barlow, the Secretary of Bankrupts to the late Lord Chancellor, Counsel to the Duchy of Cornwall, in the place of Mr. Mac Arthur.

NEW RULES IN THE COURT OF COMMON PLEAS.

The Court, on the last day of Term, (Monday, 9th May,) pronounced the following General Rules.

Fees on filing Declarations.

1. That in future it shall not be necessary to pay the Prothonotary's fees at the time of filing the declaration, but it shall be sufficient if they be paid before the issue is joined; or, in cases where interlocutory judgment is signed, before the costs are taxed.

Pleading after Amendments.

2. That in all cases where the plaintiff shall have obtained leave to amend the declaration, the defendant shall have two days after such amendment to withdraw his plea, if he chooses, and plead *de novo*, without making any application for that purpose. The plaintiff need not give a new rule to plead.

SUPERIOR COURTS.

LORD CHANCELLOR'S COURT.

PLEA. — FOREIGN LOAN. — CONTRACT.

A plea of facts which may furnish an answer to an action at law, will not be a good plea to a bill for discovery.

This was an appeal from a decision of the Vice Chancellor, by which he over-ruled the plea filed by the defendants. The bill stated, that in 1822, the Spanish Cortes entered into a contract with the house of Bernales and Co., in London, for a loan of 40,000,000 of reals de vellon, in *rentes*, and that various bills of exchange were drawn by Bernales and Co., in favour of the persons who had advanced the value to the Spanish government, many of which bills were not paid when they became due. That by a decree, dated the 16th of May, 1823, the government of Spain was authorised to carry into effect any contracts which had been made by the commissioners in London, and to negotiate such part of the 40,000,000 of reals, as might be necessary to cover the bills negotiated and drawn by Don Luis de la Piedra, one of the partners in the house of Bernales and Co., and the charges occasioned by the non-payment of such bills, reserving the remainder of the 40,000,000 until it might be deemed useful and opportune for the national interests of Spain, and that the national revenues should be employed in the repayment, and that certificates and rents at a stipulated price should be given to such as might require them of the parties interested in the bills, holding upon the property of the nation a special pledge, until they were completely satisfied. That under the authority of such decree, Don Manuel Maria de Alzaybar, Don Jose Loredon, Don Wenceslas Sierra, and Don Antonio Martinez, the agents of the Spanish government, in July, 1825, entered into a treaty with Sir John Lubbock, Charles Buisson, and James Campbell, the defendants, for the purpose of issuing a part of the *rentes*; and that an agreement was thereupon executed between them. This agreement stated that bills to the amount of 800,000*l.* sterling had been drawn upon and accepted by Bernales and Co., of which 73,000*l.* only had been paid, and the remaining one had been returned protested to Spain. In order, therefore, to provide for the payment of such dishonoured bills, with the exchange and charges, and a further sum of 38,223*l.* 18*s.* 9*d.* of British demands upon the Spanish government, the Cortes had decreed the inscriptions issued to Bernales and Co. to be void, and directed new inscriptions to be issued for 580,000 and 24,000 dollars of *rentes* at 5 per cent., the proceeds of which were to be applied in liquidation of the before-mentioned claims; that the commissioners had been directed by the decree of May, 1823, to proceed, with the agency and assistance of Sir John Lubbock and the other defendants, to effect such liquidation; and that the new inscriptions had been transmitted to the commissioners for that purpose. That the commissioners had therefore determined to issue certificates upon the authority of the new inscriptions, and had requested the assistance of the defendants in the negotiation thereof, and in appropriating the proper amounts in certificates of each holder of the bills and claims; and arrangements had been entered into between the commissioners and the defendants consisting of the following articles: — 1. That the commissioners should issue certificates of different amounts from 25 to 400 dollars *rentes*, at 5 per cent., payable to bearer, the dividends whereon were to be made payable at the bank-

ing-house of James Campbell and Co.; but they were not to guarantee or be liable for the payment of such dividends farther than such sums as might be placed in their hands for that purpose. — 2. That Don Martinez, being authorised for that purpose by the Spanish government, sanctioned the delivery by the commissioners for the defendants, Sir John Lubbock, and Campbell and Co., who bound themselves to deliver the certificates to the holders of the bills of exchange and British claims, as adjusted by the officers of the government in Spain; and if it should appear that the two sums of inscriptions were inadequate for the full payment, Don Martinez was to apply to the Spanish minister of finance for such further sum of subscriptions as might be requisite. — 3. That in addition to the above certificates, the commissioners would deposit with Sir J. Lubbock, and Campbell and Co., such further sum in certificates as would be sufficient to raise last half year's interest, from the 1st of May, 1823, to be payable at the house of Campbell and Co. on the 1st day of November, 1823, and the 1st of May, 1824; and after the last-mentioned certificates should be sold and realised, Campbell and Co. were to allow interest thereon at 3½ per cent. until they should become payable; but neither Sir J. Lubbock and Co., nor Campbell and Co., were to be liable to such payments until they should be in cash. — 4. Sir J. Lubbock, and Campbell and Co., were to be at liberty to sell publicly or by private contract the certificate for payment of the first year's interest, and the expenses attending the negotiation, and to render an account for the same. — 5. A commission of 4 per cent. to be allowed to the defendants upon the amount at which the certificates were agreed to be paid to the bill-holders and claimants, and on the amount of certificates sold at the price for which they should be sold. —6. The certificates to be of the form annexed; and the same as those delivered to Ardoin, Hubbard, and Co., of Paris. — 7. The defendants were to be at liberty to act as agents and correspondents of any bill-holders and claimants, without prejudicing their right to the stipulated commission. — 8. During the period in which the certificates were in preparation by the commissioners, the defendants Lubbock and Campbell should employ themselves, with Don Martinez, in ascertaining the sums due, and arranging the number and amount of certificates to be issued in respect thereof. — 9. Sir J. Lubbock and Co., and Campbell and Co., engaged, out of the moneys they should receive from the sale of certificates, to pay the expenses of the commission, &c.; and in anticipation, Sir J. Lubbock, and Campbell and Co., had advanced to the commissioners 1500*l.*, which was to be reimbursed by the sale of certificates; but it was agreed that Sir J. Lubbock, and Campbell and Co., should not become liable to pay any other sum of money, nor were they, in any part of the transactions or negotiations, to be liable or responsible to any of the bill-holders or claimants for any sums whatever, further than what should be received by them upon the sale of the certificates, deducting the stipulated commission. The bill further stated, that Don Martinez delivered to the defendants certificates to the amount of 580,000 and 24,000 dollars of *rentes*, which were equal in amount to 838,000*l.* sterling. That the plaintiff, John Robertson, was, at the time of the contract being executed, a creditor of the government of Spain to the amount of 1,000*l.*, and entitled to receive certificates from the commissioners of 1500 dollars of *rentes*, and that such certificates were delivered to him, his claim being acknowledged for that sum. That in addition to the before-mentioned certificates, the commissioners delivered to the defendants, under the third article of the contract, other certificates, amounting to 125,000 hard dollars of *rentes*, to be sold for the purpose of raising the two half years' interest; and that the defendants, by an agreement of the 29th of August, 1823, admitted that they held the same upon trust, for the purpose of selling them and applying the produce in payment of such interest. That a part only of the first set of certificates was disposed of; but that the defendants immediately sold and disposed of the whole or a considerable part of the second set, and more than sufficient for payment of the first year's interest, and the expenses and commission; and that they paid the first half year's interest, and still held in their hands more than sufficient to pay the second half year's interest, but that they refused to pay the same. That the plaintiff had commenced an action at law to recover from the defendants 2000*l.*, being the remaining half year's interest due to him, as money had and received by the defendants to his use; and believed he should recover, if the defendants would disclose the nature of the transactions before stated, and give an account of all moneys received by them in respect of the second set of certificates appropriated to the payment of the interest and the bill; which therefore prayed such discovery and account, in aid of the action at law.

The defendants pleaded, that they never entered into any contract with the plaintiff, or with any other person entitled to the certificates in the bill mentioned, and that they had never received any of the moneys arising from the sale of such certificates for the use or benefit of, or in trust for, the plaintiff, or as moneys specifically appropriated for payment of the year's interest. This plea was argued before the Vice Chancellor, who decided that the plea was multifarious, and it was accordingly over-ruled.

It was argued for the appellants, that the bill ought to show distinctly upon the face of it that the plaintiff had a right to maintain the action he had brought, which this bill did not show. There were two questions — first, whether there was any contract at all; and, secondly, whether, if there had been, such contract was made by the defendants with the plaintiff. A contract with *A.* for the benefit of *B.* would not support an action; here the instrument was an authority to the defendants, and not a contract. They therefore contended that the plea was good, and that the decision of the Vice Chancellor ought to be reversed.

For the respondents, it was contended, that the bill was a mere bill of discovery, and all that

the plaintiff was required to show was, that he had a title to the discovery he sought. What that discovery might lead to, or what might be the relief to which the plaintiff might be entitled at law, were questions that did not arise in this suit, and to which the plea had therefore no application. It was decided in *Hindman* v. *Taylor*, 2 Bro. 7., that a plea of facts, which might furnish an answer to an action at law, would not be a good plea to a bill in equity for a discovery leading to legal relief; and similar decisions had confirmed the principles so laid down.

The *Lord Chancellor* said he was of opinion, for the reasons which had been stated by the counsel on the part of the respondents, that the plea must be over-ruled. The principle laid down in *Hindman* v. *Taylor* applied directly to this; and for that reason, as well as upon the grounds which had influenced the Vice Chancellor's judgment, he affirmed his Honour's decision. He therefore ordered the defendants to answer within six weeks.* *Robertson* v. *Sir J. Lubbock and others.* April 25. 1831.

VICE-CHANCELLOR'S COURT.

FORECLOSURE — 7 GEO. 2. c. 20. — COSTS.

This was a bill of foreclosure. — On the motion of Mr. *Hayter*, an order was obtained to refer it to the Master to take an account of the principal, interest, and costs, under and by virtue of the statute 7 Geo. 2. c. 20. Before the order was drawn up, Mr. *R. B. Chichester*, who appeared for plaintiff, stated to the Court, that subsequently to the filing of the bill in equity, certain proceedings had been commenced at law, and it was desired that an account should be taken, not only of the costs of the proceedings in equity, but also an account of the costs accrued at law; but doubts were entertained whether the Court, under the statute, had the power to make such an order, and the case of *Millard* v. *Major*, 3 Mad. 433. was cited. The *Vice Chancellor*, however, decided that the order should embrace both the costs in equity as well as those at law. — *Dawkins* v. *Evans*, April 29. 1831.

COURT OF KING'S BENCH.

Sittings at Nisi Prius.

ATTORNEY, AUTHORITY OF.

An attorney, instructed to make a tender, is not impliedly authorised to pay the money into Court.

Action for an attorney's bill. The defendant, having been sued in the Palace Court by a person of the name of Plimpton, employed the plaintiff to enter an appearance for him. The business was conducted through the agency of Mr. Arden, and the claim upon the defendant in respect of that business amounted to 9*l.* 14*s.* The remainder of the plaintiff's bill consisted chiefly of charges in another action brought gainst the defendant by a Mr. Nelson. The defendant, it appeared, had desired the plaintiff to make a tender of 15*s.* to Nelson, in order to stay proceedings; but it being doubtful at that time whether a writ had not been actually sued out at the suit of Nelson, the plaintiff told the defendant, that if that should turn out to be the fact, the tender would not save him from the costs of the writ. The defendant, being about to go out of town, desired the plaintiff to attend to the business for him; and as it afterwards appeared that the writ had been sued out, the plaintiff paid the 15*s.* into court. The defendant, after his return to London, was informed that the costs which he was liable to pay to Nelson amounted to 7*l.* 16*s.*; and he then expressed his surprise that any costs had been incurred, and insisted that his authority to the plaintiff to make a tender of the 15*s.* did not justify him in paying the money into court.

The defendant conducted his defence in person. Having admitted several of the items in the bill, which the plaintiff was unable to prove, he said his object was not to deny that the business was done, or to object to any particular items. He objected to the bill *in toto*; and his object now was to obtain the opinion of the Lord Chief Justice of England, whether an attorney who had conducted himself as Mr. Welsh had done, was entitled to recover compensation for his services? The defendant then went on to say, that he had been introduced to Mr. Welsh in the year 1827, when he (the defendant) was chairman of a committee of gentlemen who had formed themselves into an association for improving the London markets. The committee used to meet at Mr. Welsh's chambers, and he (the defendant), having at that time been served with process from the Palace Court at the suit of a person of the name of Plimpton, employed Mr. Welsh as his attorney. Some time afterwards a Mr. Nelson, of whom he rented a cottage, made a demand upon him of 6*l.* for rent. He owed nothing; on the contrary, Mr. Nelson was his debtor to the amount of 1*l.* 7*s.* in respect of land-tax which he had paid for him. He thought it right, however, to make a tender of 15*s.*; and he accordingly went to Mr. Welsh, and gave him a sovereign to make the tender, as he (the defendant) was about to leave London for Liverpool. This was in November, 1827. On his return to town in January, he saw Mr. Welsh, and asked him if he had heard any more of the action. He replied he had not, and he did not expect that he should. On the 11th of February, however, he (the defendant) received a note from Mr. Welsh, informing him that the costs which he was liable to pay to Mr. Nelson amounted to 7*l.* 16*s.* besides 15*s.* which he had paid into court. The defendant proceeded to say, that he afterwards applied to Mr. Welsh for an explanation; and having denied that he gave him any authority to pay money into court, Mr. Welsh refused to tell him to whom the 7*l.* 16*s.* was to be paid; and that ultimately he was obliged to pay additional costs, making altogether 10*l.* 17*s.*

The defendant then gave in evidence a letter, which he had written to the plaintiff on the 17th of February, 1829.

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* The case of *Hindman* v. *Taylor*, on which the Lord Chancellor mainly relied, has been much shaken in a recent decision of the present Vice Chancellor. *M'Gregor* v. *East India Company*, 2 Sim. 452.

Mr. *Moody* repelled the imputations cast upon the plaintiff.

Lord *Tenterden* observed, that the defendant having admitted the charges, the only question was, whether the plaintiff was justified by the instructions he received from the defendant in paying the 15*s.* into court. If they thought that he was, they would find for the full amount of the demand, viz. 22*l.* 11*s.* 10*d.*; but if not, their verdict must be confined to the other part of the bill, amounting to 12*l.* 13*s.*

The jury found for the latter sum. *Welsh* v. *Mills*, March 24.

COURT OF KING'S BENCH.

ATTORNEY'S LETTER.—PROBABLE CAUSE.

The existence of probable cause for preferring an indictment, is a question of law for the Court, and not of fact for the jury.

In an action for maliciously prosecuting the plaintiff for felony, the following facts appeared:—On the 5th February, 1830, a man in the dress of a sailor went to the shop of Messrs. R. & W. Blachford, chart publishers, &c. in the Minories, and representing himself as mate of the ship *Malvina*, said he wished to purchase a quadrant, and two charts, to take out with him to the Mediterranean. Having looked at the articles, and agreed upon the price (3*l.* 13*s.*), he tendered in payment a paper, purporting to be an advance note for his wages, signed by Messrs. Graham, the owners of the vessel, and Captain Doyle, the master. He was told by Mr. W. Blachford, one of the partners, that they were not in the habit of taking advance notes in payment for articles sold by them; but Mr. Blachford proposed to make enquiries about him of Messrs. Graham, who, the sailor said, resided at No. 51. Mark Lane. He objected to any reference being made to them; but said he was known to Messrs. Dod and Son (the defendants), who were ship-brokers, at No. 10. Mark Lane, and he could refer to them for enquiries as to his character. It was then proposed, that Messrs. Blachford's clerk, William Imray, should accompany him to the defendants', to make the necessary enquiries. Imray and Forbes (that was the name the man gave himself) accordingly went together to the defendants' counting-house. They first saw a clerk, to whom Forbes introduced himself as mate of the *Malvina*, and the clerk then showed them into an adjoining room, to Mr. Charles Dod, the son of the other defendant, Mr. Henry Dod. Forbes told Mr. Dod that he was going out as mate in the *Malvina*; and having made a purchase of some charts, &c. he had tendered his advance note in payment. Imray, it seemed, did not make any particular enquiries of Mr. Charles Dod, who, however, said he knew the man, and had relieved him last summer, but could not be answerable for the payment of the note. Imray replied, that it was not wished he should guarantee the payment; all that was desired for him to say was, whether or not he knew Forbes. Imray and Forbes then returned to the shop, and the articles were delivered to Forbes, who left the note in payment. This was on Friday, the 5th of February. On the following Monday Mr. W. Blachford received by post a letter from Forbes, stating that the representations he had made were false. Mr. Robert Blachford, the uncle and partner of Mr. Blachford, had been out of town. On his return on Tuesday, the 9th, he was informed of what had occurred; and on enquiries being made, it turned out that the whole of the representation as to the ship, the owners, the captain, and the advance note, was untrue. Mr. Robert Blachford then waited on Mr. Charles Dod, for the purpose of getting some explanation of the conversation which had taken place between him and Forbes on the Friday. Mr. Dod denied all knowledge of Forbes, and told Mr. Blachford he must be mistaken in coming to him, as he knew nothing of the circumstance to which he referred, and had never represented that he knew Forbes. Mr. Blachford then said he would fetch the person who had accompanied Forbes to him on the Friday; and he went back to the Minories for that purpose. On his return with Imray, in about a quarter of an hour, he was informed that Mr. Charles Dod was not in the way; and he was unsuccessful in several other attempts which he made to see him. Messrs. Blachford then communicated the circumstances to the plaintiff, Mr. John Blachford, an attorney, and the nephew of Mr. Robert Blachford, and desired him to write to the defendants, to require payment from them of the 3*l.* 13*s.* The plaintiff then wrote to the defendants a letter in these terms:—

"8. Fenchurch Buildings, 1830.

"Gentlemen,

"I am directed by Messrs. R. and W. Blachford, of the Minories, to apply to you for the purpose of demanding payment of 3*l.* 15*s.*, for goods obtained from them through your reference from your firm, under circumstances which make it incumbent on them to bring it under the notice of the public, if you do not immediately discharge the amount. I have my clients' instructions to adopt measures, if the matter be not arranged in the course of to-morrow; and as those measures will be of serious consequence to you, I hope you will see the propriety of preventing them by your attention thereto.

"I am, &c.

"J. BLACHFORD."

The letter, having been perused and approved by Mr. Robert Blachford, was sent, on the 11th of February, to the defendants. They having taken no notice of it, Messrs. Blachford directed the plaintiff to take out a summons against them, to compel their attendance before the Lord Mayor, to answer for or explain their conduct. A summons was accordingly obtained, and the parties attended at the Mansion House on the 18th of February, when the case was heard and dismissed. On the 26th, the plaintiff received from the defendants a notice in these words:—

"7 & 8 G. 4. c. 29. ss. 8 & 9. for sending a threatening letter, &c.

"Sir, We give you notice, that we intend

preferring a bill against you at the next Old Bailey Sessions.

"Your obedient Servants,
"H. Dod & Son.

"To John Blachford, Esq. Solicitor."

In the month of May following, a bill was preferred against the plaintiff for having knowingly and feloniously sent to the defendants a letter, "threatening to accuse them of having unlawfully obtained goods on false pretences, with intent to cheat and defraud Messrs. R. and W. Blachford," with a view to extort money from them. The bill having been found at the Old Bailey, a bench warrant was issued against the plaintiff. He was admitted to bail until the July sessions, when he surrendered and took his trial. The indictment was founded on the 8th section of Mr. Peel's act, of the 7 & 8 Geo. 4. c. 29., which enacts, "that if any person shall knowingly send or deliver any letter or writing, demanding of any person with menaces, and without any reasonable or probable cause, any chattel, money, or valuable security, he shall be guilty of felony," &c. The whole of the facts having been gone into at the trial, the plaintiff was acquitted. The present action was brought for a malicious prosecution.

Sir *James Scarlett*, in addressing the jury for the defendants, said, that the representation made by Mr. Charles Dod to Imray, was merely that he had once seen Forbes in the summer, and given him a trifle of money as a distressed person. He did not intend to vouch for his character; and in point of fact he made no representation on the subject. He merely stated that he knew him by having relieved him in the course of the last summer. His learned friend Mr. Campbell had said that Mr. Peel's act, under which the prosecution in question was founded, did not apply to the case of an attorney sending a letter on behalf of his client. It did not, of course, apply where an attorney wrote a letter *bonâ fide* for the purpose of obtaining payment of a debt for his client; but if it was applicable, as it clearly was, to the case of a person "demanding money with menace," it applied, *à fortiori*, to an attorney writing such letter. What was the object of the letter, but to threaten the defendants with a public exposure by a prosecution? There was no other way "of bringing the matter before the public." The expression, "as the nature of the measures to be adopted will be of serious consequence to you," &c., could mean nothing else than an indictment. The letter, therefore, was, in the very terms of the act of parliament, "a demand of money with menaces." That it was a demand "without reasonable or probable cause," could not be doubted; for it was impossible to say that there was reasonable or probable cause for demanding of the defendants payment of the debt contracted by Forbes. That the object was to obtain payment of the 3*l.* 13*s.*, by accusing the defendants of having induced Messrs. Blachford to part with their goods on false pretences, appeared from the language of the summons which the plaintiff obtained from the Lord Mayor. That document summoned the defendants to appear before the chief magistrate "to answer the complaint of Messrs. R. & W. Blachford, of having unlawfully obtained goods under false pretences, with intent to cheat and defraud them thereof."

Lord *Tenterden* C. J.—If that is the form of the summons, taking it to have been given in evidence, I am of opinion that there was probable cause for the prosecution against the plaintiff. It is not necessary that an offence should be charged in the letter demanding money. It is enough if the party conceived that it was intended to charge an offence. Now, the letter in this case, although expressed in indefinite and ambiguous terms, was followed up by the summons, which expressly charged the defendants with having obtained goods on false pretences. There was, therefore, I think, probable ground for preferring the indictment.

Campbell pressed to be allowed to take the opinion of the jury upon the question of probable cause; but

Lord *Tenterden* C. J. said he thought that that question was one of law for his decision, and not a question of fact to be determined by the jury. He was of opinion that there was not only a want of probable cause, but not even a plausible pretext for demanding the money from the defendants. His Lordship then recapitulated the principal facts of the case; and said, that whatever doubt he might have entertained upon the question of reasonable or probable cause for instituting the prosecution against the plaintiff, he could have none after seeing the terms of the summons upon which the defendants had been required to appear before the Lord Mayor. His opinion then being, that there was probable cause, the plaintiff must be called.

A nonsuit was then entered.

Campbell now applied for a rule *nisi*, to set aside the nonsuit, and for a new trial, on the ground that the question of probable cause was for the jury.

The *Court* were unanimously of opinion that the direction of Lord *Tenterden* was correct, and therefore refused the rule.

Rule refused.

Blachford v. *Dod and Another*. E. T. April 19. 1831.

SITTINGS IN CHANCERY.

After Easter Term, 1831.

LORD CHANCELLOR.

Tuesday, May	11. 12.	Appeals.
Friday,	13.	Seal.

VICE CHANCELLOR.

Tuesday, May	10. 11. 12.	Bankrupt petitions.
Friday,	13.	Seal.

MASTER OF THE ROLLS.

There will be no Sittings in this Court during the present Easter Vacation.

MINOR CORRESPONDENCE.

QUERIES.

LEGACY — HUSBAND AND WIFE.

A. by will bequeaths a share of the residue of his personal estate to *B.* (who is the wife of *C.*), payable on the death of *X.* A few years after the testator's death, *B.* dies, leaving *C.* and *X.* surviving. What interest has the husband, *C.* (supposing *X.* to be still living), in the legacy? and does he claim as his wife's administrator, or how otherwise? And is an assignment of such interest by *C.* to a creditor, before letters of administration, valid or not?

A COUNTRY SUBSCRIBER.

ARTICLED CLERK.

C.'s articles with *Z.* have expired; *Z.*, on account of some personal quarrel, refuses to certify that he has faithfully served him; what course must *C.* take to compel him?

O. Q.

DILAPIDATIONS.

Is it within the province of the Common Law Commissioners to recommend an amendment of the law as to dilapidations?

W. H. M.

BANKRUPT'S CERTIFICATE. — SURETY.

Does the signing a bankrupt's certificate by a creditor operate as a discharge of the liability of the surety?

PLEADING — INDICTMENT.

When an offence is committed on the day on which the king's demise happens, is it to be laid in an indictment as against the peace of the deceased sovereign, or the successor, whose reign is said to commence on the same day? or may it be against either? It is presumed it cannot be said to be against the peace of both, as there is no fraction of a day?

As it may occur in places at a great distance, that an offence shall be committed in the reign of one king, and an indictment preferred and found in the reign of his successor, before the demise is known, in which case the act would be laid as if the former king were still living, what would be the consequence? See *Lockup*'s *Case*, 3 Burr. 1901.

ANSWER TO QUERIES IN NO. XXVI.

JOINT ACTION.

Supposing that the amendment, *as stated*, can now be permitted at all, which is questionable if a *different cause of action* is to be added, *C.* must clearly be made a party to it. After the amendment it will become a new declaration, to which, of course, the prior judgment would not apply; that judgment must be abandoned, and *C.* is entitled to have the liberty of pleading to the amended declaration. The co-defendant who has joined issue is also entitled to plead *de novo* within a certain time, if his defence is in any way altered by the amendment, and the issue must be re-delivered after the amendment is complete by payment of the costs. The plaintiff cannot take judgment upon the amended declaration against *C.* without a new rule to plead*, unless it is dispensed with by the act of that defendant, or by the terms of the Judge's order to be made upon the summons to amend, whereby *C.* may be required to plead within a *fixed* time if he shall think fit.

X. D.

SURVIVING PARTNERS.

In answer to the query of J. it was held in *Godfrey* v. *Browning* (cited in Watson on Partnership, p. 359.), that one copartner *could not* appoint a *representative* to carry on the trade after his decease, otherwise it might fall to the lot of an infant or person not fit to carry it on; and it would be of bad consequence in general to say that in articles of partnership in trade, where no provision for the death of either is made, they might subsist for the benefit of an *executor* (*Pearce* v. *Plummer*, Watson on Partnership): I should, therefore, conceive, as no provision was made in case of death, that the partnership is dissolved. It was so held, in *Pearce* v. *Chamberlain*, 2 Ves. 33.

T. E.

A correspondent, A. F. C., has also referred to the latter case, and to that of *Crawford* v. *Hamilton*, 3 Madd. 248.

ANSWERS TO QUERIES IN NO. XXVIII.

STAYING PROCEEDINGS — NON PROS.

1. There are few but have felt the difficulty suggested by your correspondent D. O. in the article headed "Staying Proceedings — Non pros." I have on several occasions tried to get a limited time appointed for the plaintiff to deliver his particulars, and have referred to the case of *Burgess* v. *Swayne*, 7 B. & C. 485., but could never prevail on the Judges at chambers to act on the suggestion of Lord Tenterden. I now prefer waiting till after the declaration, so as to preserve my *non pros.*; or, if that is not done, the only mode, as it appears to me, is to vacate the order for particulars, and then apply by summons for the plaintiff to declare within a given time; and this was the course once suggested to me by one of the learned Judges.† *

W. H. M.

2. Take out a summons for the plaintiff to deliver his particulars of demand within a certain time, or, in default thereof, for the defendant to be at liberty to sign judgment of *non pros.*, and the Judge will make an order; 7 B. & C. 485.

J. C.

3. *B.* should take out a summons to rescind the order for particulars of the plaintiff's demand, because such order stays all proceedings until the particulars are delivered. The Judge will make a rescinding order as a matter of

* This is now altered, see p. 26. *ante*.

† A correspondent, D. Y., has obligingly sent his card to the publisher, and will produce orders in the King's Bench and Common Pleas, by which the defendant was at liberty to sign judgment of *non pros.*, in default of the delivery of the particulars.

course, after which judgment of *non pros.* may be signed.

H. C.*

STAMP DUTIES—LAWYERS' CERTIFICATES.

A "Reformer" is informed, what is sufficiently clear by the last stamp act (whatever else may be obscure in that fiscal net), that the lower duty only is payable upon certificates the first three years after the *admission* of the attorney, the act containing no reference to the time of the expiration of the articles; and if a period of twenty years intervened, it would be immaterial.

H. C.

FALSE JUDGMENT.

As I think that no security is required to be given on bringing this writ, I should be glad to know from your correspondent what has been done in the case mentioned by him in No. XXIII. page 567. The stat. 23 Geo. 2. c. 33. s. 4. prohibits the removal of any proceedings out of the County Court of Middlesex by writ of false judgment, or otherwise, only in cases where the debt or damages do not amount to 40*s.*, plaints in replevin excepted.

X. D.

PARTNERSHIP LEASE.

The following case occurs in my own practice at this very time. *A.* and *B.* entered into a contract for a partnership to last twenty-one years. At the time they entered into the contract, they took a lease, in the form of an agreement for a lease, of the partnership premises, for two years. By the agreement, *C.*, the landlord, engages to grant to them both (not, "or one of them,") a lease for twenty-one years from the commencement of the partnership, at any time within the two years. *A.* and *B.* differ, and, in consequence of malversation of the partnership property by *B.*, *A.* seeks to dissolve the partnership and to take the premises to himself alone. *B.*, however, colluding with *C.*, declines taking the new lease, and determines to wait until the two years run out, when *C.* is to grant the new lease to him, *B.*, alone. A bill is now in preparation, *A.* against *B.* and *C.*, in which *A.* will pray that the partnership may be dissolved, and also that any new lease to be granted by *C.* to *B.*, of the partnership premises, during the term for which, by the contract, the partnership was to enure, even though the partnership should then have been dissolved, may be declared to be property to which *A.* and *B.* shall be together beneficially entitled. *A.*'s counsel is of a decided opinion that the Court will so declare.

A Subscriber.†

* We have received a similar answer from another correspondent, with the same signature.

† If J. D. S. has a real case such as he states in the query, our subscriber and he may assist each other with the opinions of their respective counsel.

MISCELLANEA.

LORDS ELDIN AND ELDON.

Mr. John Clerk (afterwards Lord Eldin), in pleading before the House of Lords one day, happened to say, in his broadest Scotch accent, "In plain English, ma Lords." Upon which Lord Eldon jocosely remarked, "In plain Scotch, you mean, Mr. Clerk." The prompt advocate instantly rejoined, "Nae matter! In plain common sense, ma Lords, and that's the same in a' languages, ye'll ken."

THE LOST WIG.

While Lord Coalstoun lived in the Advocates' Close, Edinburgh, a strange accident befell him. It was at that time the custom for advocates to dress themselves in gowns and wigs at their own houses, and to walk so habited to the parliament house. They usually breakfasted early, and, when dressed, not unfrequently leaned over the parlour window for a few minutes, before St. Giles's bell started the sounding peal of a quarter before nine, enjoying the agreeable morning air. It so happened, that one morning, while Lord Coalstoun was preparing to enjoy this morning treat, two girls, who lived in the second floor above, were amusing themselves with a kitten, which they had slung from the window by a cord tied round its middle, hoisting it up and down, until the creature became desperate in its exertions to escape. At this crisis his Lordship had just popped his head out of the window below, little suspecting what danger was suspending over his head, like the sword of Dionysius, when down came the exasperated animal, in full career, on his wig! No sooner did the girls perceive what sort of landing place this kitten had found, than, in their terror and surprise, they began to draw it up; but this measure was now too late, for, along with the animal, up came the Judge's wig, fixed in its determined talons. His Lordship's surprise, on finding his wig lifted off his head, was redoubled on beholding it dangling in the air, up and down, without any visible means by which its motion could be accounted for. The astonishment of the learned Judge below—the expression of mingled terror and mirth of the girls above—and the fierce energy of puss between,—both are beyond the power of language to describe.

GOD SAVE THE KING.

Indictment on the stat. 1 G. 1. c. 5. § 1. (the riot act) for a capital felony, in remaining together for one hour after the making of the proclamation under that statute. It appeared that about 250 persons had assembled together in a riotous manner, and had threatened to break threshing machines, when Dr. Jones, a magistrate, read the proclamation from the riot act; but in the reading it, he omitted to read the words "God save the King," at the conclusion.

Mr. Baron *Vaughan* and Mr. Justice *Alderson* held that, as those words at the end of the proclamation were omitted to be read, the charge could not be supported. Their Lordships directed an acquittal. *Rex* v. *Child*, 4 C. & P. 244.

The Legal Observer.

Vol. II. SATURDAY, MAY 21. 1831. No. XXX.

——— "Quod magis ad nos
Pertinet, et nescire malum est, agitamus."
HORAT.

SKETCHES OF THE BAR. No. IV.

MR. HUMPHREYS AND MR. SANDERS.

THE conveyancing portion of the profession has very lately been deprived of two of its most eminent practitioners, Mr. Humphreys and Mr. Sanders. The life of a conveyancer is so uniform and quiet, that it generally affords little worthy of remark; and the greater the practice of the individual, the less he mixes with the world, or busies himself in public affairs. The nature of his pursuits has so many advantages and attractions, that it is not at all surprising that many men of the first talents have preferred the life to any other. There is something extremely agreeable in his labours and powers. Throned in his chair, he rules his little empire, and demands the most submissive attention to his mandates. He issues his decrees from his chambers, calling to his assistance (and needing no others) his books, the ready instruments of his will. He is monarch of all he surveys. His opinions are the supreme law of his clients; and although they may be occasionally opposed by some neighbouring potentate in the shape of a rival conveyancer, the utmost extremity of difference is conciliated, and generally ended by a consultation. He has not, as at the bar, to fight his way amidst a host of opponents: he has not to watch the peculiar temper of a Judge: he is himself the counsel and the Judge of his own court.

It is not surprising, then, we say, that this life should have many peculiar charms for men of the greatest talents; but it is the most unfortunate life in the world for the biographer. It must be passed in a regular routine. Each day brings its constant and unvaried duties. Mortgages, settlements, purchase-deeds; purchase-deeds, settlements, mortgages; cases and abstracts, abstracts and cases: these are the well known and constant occupations of the conveyancer. His life is devoted to them, and he has neither time nor desire to employ himself in others.

This observation peculiarly applies to the two eminent persons whose deaths have occasioned these remarks. The history of their lives is soon told. Mr. Humphreys was born, we believe, about the year 1765. He was a pupil of Mr. Butler; and after leaving him he commenced practice as a conveyancer under the bar, and soon obtained a considerable business. Although always well known as a conveyancer, and slightly distinguished as an author on legal subjects (having written the articles on Real Property in the Supplement to Viner's Abridgment), it was not till the year 1826 that he was extensively known beyond the pale of his own profession. He then published his "Observations on the Law of Real Property, with the Outlines of a Code." This able work, which he had been long preparing, soon attracted general attention, as well in the profession, as in parliament, and in general society. However incorrect it may be in parts, it undoubtedly gave a strong impetus to the cause of law reform; and we shall always look back to its author with gratitude and admiration. It is a singular fact, that his professional business greatly increased after the publication of this work; and, doubtless, he displayed in its pages an intimate knowledge of the system which he was so anxious to destroy.

We have seen many of his drafts; and, although an able conveyancer, he certainly made no attempt to abridge the long-established forms in his practice.

Notwithstanding his increased professional labours, he managed to maintain a sturdy conflict with Sir Edward Sugden, on the principles which he had espoused in his work, and carefully to correct and revise it for a second edition, which was called for within a year from the publication of the first. He also published some sugges-

tions as to the stamp laws in 1829; and answered very carefully, and at great length, all the queries of the Real Property Commissioners.

In private life he was much esteemed, and his society was much courted. His manners, however, were rather formal and reserved. Had he lived to the present time, he might probably have been the first conveyancing master; and he would well have deserved that honour, were it only that he was one of the few who are not content to leave things as they found them, but are desirous of effecting an improvement in them. He died in November, 1830.

Mr. Sanders was born in the year 1769, and very early in life devoted himself to that part of the profession in which he distinguished himself. He was a pupil of Mr. Stanley, who was afterwards attorney-general for the Leeward Islands; and so well did he employ his time with him, that he published his valuable and popular Essay on Uses and Trusts in 1791, being then about twenty-two years old. Indeed, it is not a little remarkable, that most of the popular works on Real Property in use at the present day were written by their respective authors at a very early age. Thus, Sir Edward Sugden's Treatise on Vendors, Mr. Preston's Essay on Estates, and Mr. Sanders's Essay on Uses and Trusts, were all published before they had attained the age of twenty-two; and other popular works might also be mentioned, which were produced as early.

Mr. Sanders's work acquired for him a considerable reputation, which was quickly followed by that large practice which he enjoyed up to his death. A second edition of his work was published in 1799, in its present form, being in two volumes; and it has ever since been considered a standard work, and is found in most lawyers' libraries.

Having founded his professional character in a manner the most certain and satisfactory, by the publication of an able and useful work, he practised for a considerable time under the bar. In 1819, he published a learned tract on the Surrender of Copyholds; and in 1830, he was appointed one of the Real Property Commissioners. Before this appointment was made, it was said that he was greatly opposed to any reform in that branch of the laws. His name is, however, attached to the Second Report of the Commissioners, and his testimony in favour of a General Registry is one of no mean importance.

He died early in the present month; and, as he was greatly esteemed and respected in private life, he will be as much missed in his own circle as he will be in that branch of the profession where he maintained the highest rank. His wife died shortly before him; and we are informed that he never recovered her death.

We have now briefly mentioned the few particulars which we have been able to collect respecting these respectable members of our profession; and if they are inconsiderable, let it be remembered, that though there are no very striking lights, there are no shadows; and that they have throughout their lives maintained an unblemished honour, and ever stood high as well for integrity as talent.

LAW REPORTING.

Reports of Cases heard and decided in the House of Lords, on Appeals from the Courts of Equity, and on Writs of Error in England and Ireland. By Richard Bligh, Esq. of the Inner Temple, Barrister at Law. Vol. 3. Part 2. Saunders and Benning.

Reports of Cases argued and determined in the Court of Common Pleas and other Courts, in Hilary Term 1831. By Peregrine Bingham, of the Middle Temple, Barrister at Law. Vol. 7. Part 2. Saunders and Benning.

Reports of Cases argued and ruled at Nisi Prius *in the Courts of King's Bench and Common Pleas, and on the Circuit, from Trinity Term to Michaelmas Term* 1830. By F. A. Carrington and Joseph Payne, Esqs. of Lincoln's Inn, Barristers at Law. Vol. 4. Part 3. Sweet.

Our readers are now pretty well acquainted with our objections to the modern system of law reporting.* We have stated them pretty distinctly; we have asserted, confidently, that the abuses of which we complain, exist; and although no one of our correspondents (who, we are happy to find, are ready enough to point out our errors) has attempted to dispute it, it is due to ourselves to prove that they actually exist. This, we can unfeignedly assure our readers, is not a pleasant task. It is much more agreeable to us to point out the merits of our professional brethren than to expose their errors, as we have shown in our critical department. Were it a single book, or a single instance, of which we complain, we should pause before we noticed it with severity: but it is an extensive system to which we are opposed; it is not one book, or one

* See Legal Observer, vol. i. pp. 247. 301. *antè*, 4.

man, but dozens of volumes, and hundreds of men; it is an evil of which there appears to be no end, which is constantly increasing, and spreading its branches more widely and vigorously every day it is suffered to exist. When, therefore, we see the numerous host we purpose to attack, our courage increases; and a new confidence inspires us whenever a new Number

"Spreads its light wings of russet or of blue."

The Reports which stand at the head of this article we have selected from a large heap which had accumulated on our table. We do not mean to say, that, taken with their other Numbers and volumes, they are in all respects more open to objection than the other contents of the heap from which we have separated them; but we think that in their last Numbers, which are now before us, they afford us tolerable examples of the faults of the present system.

In the first place, we have alleged that the cases at present reported are given at too great length — that they are specimens of book-making — that they contain tedious statements of unimportant facts, and long recitals of deeds, wills, and other instruments, which might be compressed into an eighth part of the space they now encumber — that this not merely increases the expense of the work, but, what is much more important, diminishes greatly the value of the Reports, by obliging the reader to wade through a mass of useless or insignificant details before he can master or understand the points decided—and that the great object of the reporter should be to save him this trouble.

This we have alleged, and in complete confirmation of our statement come the reports of Mr. Bligh. The present Number consists of 158 pages. It is entirely occupied by three cases, the third of which it leaves unfinished. Now, it must be remarked, that these three cases are comparatively unimportant. The first is a case merely of local interest, — on the right to appoint the clerk of the peace for King's County in Ireland; the second decides no new point whatever, but rests on the most familiar principles of equity; and the third, although the most important of the three, is certainly not of sufficient consequence to occupy the space that is given to it. We are sorry, therefore, that we are obliged to declare that Mr. Bligh's reports are complete examples of a part of the evils of the present system.

From the fault of unnecessary prolixity we consider Mr. Bingham's Reports to be tolerably free; but this is not the only objection that we have made. We have also complained that modern Reports are frequently inaccurate. We are happy to acknowledge that, as a whole, this gentleman's Reports are not worthy of blame in this particular. How happens it, then, that in the present Number his marginal notes have been so carelessly composed? Thus, in the first case reported, *Bull* v. *Price*, 237., we have the following marginal note:—"Plaintiff retained defendant, a surveyor, to negotiate the sale of her reversionary interest in certain premises, and to give him *two per cent.* on the sum obtained." It turns out, on the perusal of the case, that the *defendant* retained the *plaintiff*. Thus, also, in the Report of the case of *Permewan* v. *Mitchell*, p. 357., where there was a devise of lands to trustees, in trust to put *E. E.* in possession of them when she comes of age; and if she die during her minority, or without issue, in trust for *E. E.* But if *E. E.* attain twenty-one, or marry, one third for the use of the first male issue of her body, one third for the use of the second male issue, and one third for the use of the third male issue, charged with an annuity for *E. E.* But if *E. E.* die without male issue, and leave female issue, for the use of the female issue, and the heirs male of their bodies. According to the marginal note, *E. E.* took an estate tail; but it appears by the certificate of the Judges, given in the Report, that *E. E.* took an estate *in fee simple*.

We have further stated it as our opinion, that many trifling and unimportant cases are reported, apparently for no other purpose than of swelling a volume; and if this objection is ever applicable, it may be made with peculiar force to *Nisi Prius* Reports, the propriety of any Report of which has been always much doubted; yet in the Reports of Messrs. Carrington and Payne, a considerable number of trivial and unimportant cases — mixed up, we are willing to allow, with some others of a very different nature — are found.

Thus, in the Number now before us, we have several cases reported, which decide the tritest points. For instance, in *Lewis* v. *Arnold*, we are informed, that if three persons are told on entering a theatre that there is room, when in fact there is not, such person should leave the theatre, and demand their money, and should not climb from the pit into a private box; that furthermore, when in the box, they will not be authorised in making a disturbance and riot; and that if, all having made such disturbance, one of the three proceeds to box a servant of the proprietor in the presence of a constable, that such constable will be jus-

tified in taking all three into custody: nevertheless, all this is gravely reported as a new point of law.

We may also notice the cases of *Stephens* v. *Myers*, and *Rex* v. *Higley*, as being equally unimportant; and others might be mentioned.

We have thus, we think, shown sufficient for the present to warrant our remarks. We shall be most happy to see that they have been attended to: and as we would more willingly applaud the merits of authors and editors than mention their defects, they will find us more eager to lend assistance to the first, than we have shown ourselves in the last.

HINTS FOR THE IMPROVEMENT OF THE LAW.

No. II.

AGAINST THE RESTRICTION OF THE BANKRUPT LAWS TO "TRADERS."

We extract the following from the suggestions of a correspondent:—

The first English bankrupt act, 34 & 35 Hen. 8. c. 4., was a general enactment against "such persons as do make bankrupt;" and by various subsequent statutes, commencing with the 13 Eliz. c. 7., the bankrupt laws have been restricted to such persons as are comprehended within the legal definition of "traders."

Notwithstanding the seeming perspicuity of such a restriction, it is well known that the determining who are "traders" has often been a question of considerable difficulty, the source of much litigation, and one which never can be completely set at rest; since the ingenuity of man is perpetually inventing some new craft, which, whether or not it can, technically speaking, be deemed *trading*, must remain to be ascertained.

Before the last act, alehousekeepers were not, bakers were, deemed traders; alum manufacturers not, brickmakers were; artificers not, brewers were; labourers not, butchers were; drovers of cattle and farmers not, carpenters, nailors, milliners, shoemakers, and smugglers were; but working tailors, land jobbers, stock jobbers, and victuallers not being wine merchants, were not deemed traders, &c. &c.

Some of these have, by the 6 Geo. 4. c. 16., become subject to bankruptcy; and the learned framer of that act (now Lord Henley), in his Treatise on the Bankrupt Law, states, "that the original draft of the act contained a provision making all lessees preparing or burning lime on their premises for sale, and manufacturers of alum and kelp, liable to the bankrupt laws; but *after very mature reflection*, it was thought proper to abandon an attempt to alter the [then] existing law" as to them.

By the statute of Hen. 8., the object of the bankrupt laws is declared simply to be "the preventing persons craftily obtaining into their hands great substance of other men's goods." Here it would seem that the amount of a man's debts, connected with conduct which indicates an inclination on his part to evade payment, is held out as being a proper criterion by which he should be subject to the bankrupt code.

Blackstone assumes, that where there is nothing bought *and* sold, there can be no necessity for an extensive credit; and the learned commentator is contented with instancing the cases of husbandmen and gardeners, who, he observes, are paid for their labour. But is it an assumption founded on fact, or justified by experience, that all the persons exempted from the bankrupt laws do not require and obtain pecuniary credit, or become involved in debt? If it were, the exceptions in their favour are evidently superfluous, such persons being indirectly exempted by the requisite amount of a petitioning creditor's claim.

Let us now examine the grounds of that principle in bankruptcy which requires that a man should "both buy and sell, and thereby endeavour to get a living," in order to "qualify" himself to become a bankrupt: Why, it may be asked, are not farmers and graziers "entitled" to the "compassionate remedy" provided by the bankrupt act, to relieve themselves from pecuniary embarrassment? Or rather, why should a farmer or grazier, who owes 100*l.* or upwards, and had done that which in a "trader" would be deemed an act of bankruptcy, (*e. g.* denied himself,) be *exempted* from the bankrupt laws? Why should the creditors of a farmer, who has, chiefly on credit, furnished himself with the various stock of an extensive farm, who frequently makes extensive purchases (though perhaps not with a direct view to sell again), and consequently requires customary credit, be denied the means of compelling a distribution of his property, when they find that he either cannot or will not pay their lawful demands? Why should *any* individual, so circumstanced or so disposed, have it in his power to transfer the whole of his property to one creditor (a transaction which the retrospective efficacy of a commission duly applied would annul), and, in open defiance, cheat all the others with impunity? Why

are the creditors of those persons (not a few), who can "*craftily*" contrive, by any means other than "trading" according to its legal acceptation, to contract more debts than they intend, though able, to pay, denied the assistance of the bankrupt laws, which are designed to protect the fair trader? In short, with reference to the question of bankruptcy, what can it matter by whatsoever means, whether by trading or not, a man gets into debt?

As to farmers, graziers, and drovers, indeed, Blackstone alleges the reason of their exemption to be, that "to subject them to the laws against bankruptcy might be a means of defeating their landlords of the security which the law has given them above all others for the payment of their reserved rents." But when Blackstone wrote (and until the last act), landlords had a legal right to distrain any property remaining on the premises after the issuing of a commission against the tenant, for the *entire* rent, notwithstanding the messenger's possession, and after an assignment by the commissioners, 1 Atk. 102.; Cooke, 213. In *Ex parte Plummer*, 1 Atk. 102., the Chancellor held, that the landlord might distrain even after *sale* by the assignees, if the goods remained on the premises. By the 74th section of the last act, the landlords of bankrupt tenants are placed, with regard to their remedy by distress, in the same situation as in cases of execution, being restrained from claiming more than one year's rent, and for any surplus they are to come in *pro rata* with other creditors. Blackstone's reason for exempting farmers, &c. from bankruptcy, would also apply to their being exempted from any *execution* against their property; and if his reason were a true and sufficient one, why were not *all* persons having to pay reserved rents likewise exempted from the bankrupt laws?

The propriety of the exceptions, which, by enumeration, are now confined to farmers, graziers, common labourers, workmen for hire, the receiver general of taxes, members of or subscribers to any incorporated or commercial companies established by charter or act of parliament, ought to be very clearly demonstrated, as countervailing the mischief to which they have assuredly given rise, by so frequently occasioning a litigation of the question, whether or not there may have been a trading sufficient to support a commission. To subject receivers general of taxes to the bankrupt laws need not necessarily endanger the prerogative claim of the Crown. *That* clearly might be very easily protected. And as to the members of commercial companies, &c., what hardship or injustice could result, if they, as such, were subject to the bankrupt laws, with respect to, and to the extent of, their interest in such concerns?

In conclusion, then, it is submitted, that it is expedient to abolish the remaining exceptions; and in lieu of "trading," to substitute, as the obvious and certain principle by which a person should be subject to the bankrupt laws, the amount of his debts, coupled with the fact of his having committed an act of bankruptcy. By this means the vexatious litigation connected with a disputed trading would be altogether avoided.

T. P.

SUGGESTIONS FOR THE IMPROVEMENT OF THE LAW AND PRACTICE IN THE COURT OF COMMISSIONERS OF BANKRUPTS.

We have received a pamphlet, bearing the above title, containing many practical recommendations, from which we select the following, which seem entitled to some consideration.

Persons liable to be Bankrupts.

It is suggested that the bankrupt laws should no longer be confined to traders exclusively, but should be extended universally to all insolvent debtors; and that minors actually engaged in trade should be liable to be made bankrupts.

That every person liable to the bankrupt laws, dying insolvent without having been adjudged a bankrupt, shall be held to have been a bankrupt at the time of his death; and his effects shall be liable to distribution amongst his creditors, unless his representatives will satisfactorily secure the payment of all his just debts in full.

Petitioning Creditor.

That any kind of debt, that can now be proved under a commission, be rendered competent to support a commission; and that an infant, in conjunction with his guardian, joining in the necessary affidavit and bond, be made a competent petitioning creditor.

That any creditor, whose debt amounts to 20*l.** or upwards, who can make oath, to the best of his information and belief, that his debtor owes 100*l.* and upwards, be entitled to sue out a commission.

The Act of Bankruptcy.

That all the acts of bankruptcy at present existing, many of which give rise to expensive litigation, and most of which are exceedingly difficult to prove, except in concert with the intended bankrupt, be abolished; and that the

* This sum we think is too small, because the expense of a commission ought not to be incurred, unless the estate is of sufficient amount to justify it.—En.

insolvency of a debtor, whose debts amount to 100*l.* in the whole, be in all cases declared a sufficient foundation for a commission.

That the proof of insolvency be declared to be *fourteen days'* [two months'] neglect to pay or satisfy [secure] a creditor, whose debt amounts to 20*l.* [100*l.*]; the demand of such debt to be made of the debtor personally, or by a notice in writing left at his place of abode.

The Commission.

That the Patent Office for issuing the commission be forthwith abolished; and that it be issued by the Lord Chancellor, without any additional expense beyond the fees now paid in his secretary's office. That, in the absence of the Lord Chancellor, a Master in Chancery be authorised to issue a commission.

That, instead of proceeding on ex-parte evidence, the commissioners shall instantly issue two warrants: the one directed to the messenger, commanding him to go to the house or houses of the person against whom the commission is issued, and there to continue till he shall be countermanded. During this provisional attendance, he shall not seize upon any thing, but shall be stationed there to prevent any of the property being carried away.

The other warrant should be directed to the debtor, and it should contain information of the commission having been issued, the name of the petitioning creditor, the time when and the place where the commission is to be opened; and it should give him notice to attend, either in person or by attorney, to show cause why he should not be declared a bankrupt. If he fail to attend, or, attending, does not show sufficient cause, the commissioners to adjudicate without delay.

That as soon as the bankruptcy is found and declared, the seizure of the property, without any further warrant, be thereby converted from provisional into absolute possession; and that the bankrupt be immediately compelled to attend any one of the commissioners, and state upon oath, that the messenger is in possession of the whole of his personal property, books, and effects.

Proof of Debts.

That the particulars of all debts to be proved, be sent to the solicitor to the commission, together with the securities relating thereto, one week at least before the day on which they are to be proved. Such a practice would prevent the proof of many fraudulent and fictitious debts, and avoid perjury.

The Dividend.

As soon as a dividend has been declared, we would suggest that the amount be immediately advertised in the London Gazette; and that a circular be sent to each creditor, stating when and where he may apply for it.

Allowance to Bankrupt.

A bankrupt, who does not keep such usual books of account as will enable his creditors to obtain a distinct knowledge of his affairs, ought not to receive any allowance whatever; and the penalty for such misconduct should extend to the refusal, for a time at least, of the certificate. Irregularity of accounts is one very active cause of bankruptcy; and it is a species of misconduct which is, in all cases, imputable either to gross and inexcusable neglect, or to fraudulent intentions.

Certificate.

Before the commissioners sign the certificate, they should appoint a public meeting for the purpose, to which all creditors who had proved should be invited by circular to attend, to show cause why the certificate should not be signed; and it should be made to depend upon the conduct of the bankrupt, in his dealings and transactions before the commission, as well as upon his conduct under it, whether his certificate, when granted, should discharge his future effects as well as his person, or only discharge his person from liability, for debts contracted before he became a bankrupt.

Public Register of Proceedings.

That an abstract of all the public proceedings in bankruptcy be made, and deposited in a proper office, for the inspection of the public. In this register should be entered the name, residence, and description of the bankrupt; the name and residence of the petitioning creditor, and the amount of his debt; the names of the commissioners, solicitor, and messenger, to the commission; the name and residence of every creditor, and the amount of each debt proved; a statement of the bankrupt's property to be distributed under the commission; the amount of each dividend, and the amount of the receipts and payments of the assignees.

BANKRUPT TENANTS—DILAPIDATIONS.

Whilst the bankrupt laws require alteration in many particulars for the benefit of creditors, the legislature, it is submitted, should not overlook the fair claims of the honest though unfortunate debtor. Amongst the hardships to which he is at present subject, is the defect in the present law as regards lessor and lessee, particularly in that branch of it which relates to the subject of dilapidation; no relief being afforded to the lessee, although a bankrupt, to prevent a verdict being obtained against him by pleading his certificate, the same being, as the law now stands, no bar to an action. A recent case of this kind occurred, where a lessee became bankrupt, and his assignee surrendered up the lease, and delivered possession of the premises to the lessor within the time limited by the act; but the bankrupt, notwithstanding his certificate, was held liable to pay the amount of the dilapidation, or surrender himself to prison,—the statute giving the bankrupt relief only from breach of *future* covenants in his lease; and being unliquidated da-

mages, the proof was not allowed under the commission. Thus the bankrupt cannot be said to be relieved from his debts, which, it is presumed, was the object of the legislature.

A. S.

ON THE CHARACTER AND INFLUENCE OF ATTORNEYS.

MANKIND have been generally too apt to attribute to those, who ought to have been distinguished by the possession of certain virtues, the vices diametrically opposite: of this, the causes have been various. In some cases, persons addicting themselves to delinquency, without concealment or shame, have, in the exercise of a peculiar but characteristic malevolence, denounced all those who were observant of moral appearances, as being hypocrites in fact, and as practising, at bottom, the very faults which their external conduct disowned. Others, whom Providence has gifted with but a small portion of wit, compared to their desire to shine in conversation, have found it the easiest and most pleasant affair in the world to shrug their shoulders, dispense knowing winks, and then hint at the impiety of the clergy and the dishonesty of attorneys. Others, again, astounded by some solitary example of depravity in quarters where they had a right to look for excellences, have descended at once from veneration to abhorrence; and, in lieu of their former unqualified praise, have lavished the most sweeping and acrimonious censures. Thus, take one who, all his life long, has looked upon doctors as supremely wise and humane; let him fall upon the tender mercies of an arch-quack, who shall complete by his nostrums what distemper has begun, and fleece his patient out of the earnings of his health, and that patient will thenceforth earnestly vow that the whole medical tribe are in league with death and the undertaker.

To the united influence of individuals of each of these classes we may attribute, in a great degree, the vapouring that has long been abroad touching the knavishness and roguery of attorneys. Your thoroughgoing villain, whose atrocities are upon too grand a scale to allow of secrecy, vents a world of spleen against men to whom people consider honour essential, and who generally take credit for the possession of that quality. The harmless generation of witlings, whose assiduity in copying Joe Miller cannot be praised too highly, would be shorn of half their splendour, were they not allowed to retail antiquated narratives of "sharp practice," and to dilate upon the fertile topic of "honest lawyers;" whilst an unfortunate remnant have felt pangs too acute, considering their slender stock of philosophy, even to brood upon law without thinking of the bottomless pit, or upon its practitioners, and not be haunted by visionary imps. When to the prejudice likely to arise from all these sources, we add that which exists in the minds of people upon whom the law has sternly vindicated its authority through the intervention of the solicitor; and when it is remembered that this last class includes the most talented and influential individuals, as well as the offscourings of humanity, we may cease to wonder at the rather odious light in which popular prejudice, still maintaining sway amongst the vulgar, has placed the attorney.

A fair investigation of the subject, however, will create a very different impression from that which the phraseology adverted to would produce. Before we can determine the degree of praise to which men are entitled by the exhibiting any given virtue, we must ascertain the force of temptation with which they have been assailed, and the ease or difficulty that would have attended a concession to such allurement. Thus, he through whose hands no money passes (save under the eye of his employer) will receive but slight commendation though he should be guiltless of embezzlement; nor will one to whom few matters, and those of minor importance, are intrusted, challenge a very high eulogy for not betraying the confidence of his friend. Now, the office of an attorney is one that puts the property and comfort of others greatly in his power; and, for the ease with which he may sacrifice the one, or appropriate the other, as well as for the wretchedness which such conduct would entail upon the deluded client, we have but to point to the sorry victims of professional dishonour whom we now and then meet with or read about. Bearing in mind, then, these undoubted facts, and considering the infinite variety and vast importance of affairs upon which solicitors are from time to time consulted, it is truly astonishing, and alike creditable to the national morals and the great body of attorneys themselves, that so few instances of misconduct occur. This rarity of vicious examples, under circumstances so favourable to their occurrence, would be in itself sufficient to refute triumphantly more serious charges, had they been made, than those which are implied

in the vague notions or random epithets of ignorance or malice.

Nor does the influence which attorneys possess in society at all belie this estimate of their character. Amongst those classes of the nation who, raised above a struggle for existence, are especially the subjects of moral influence, solicitors enjoy a power seldom, if at all, rivalled. We are not, at present, over addicted to religion; and various causes have combined to diminish that supreme authority which once attended priestly suggestion or reproof. As the frame of society has grown more artificial, and the transactions between man and man have assumed a continually increasing refinement; as property has become an object of more vehement desire, and the emergencies demanding its transfer have been multiplied, so the seasons of legal interference have become more numerous, abilities and integrity have been oftener brought into play, and the influence of their possessors has accordingly increased. Let it not be said that we are overrating the influence of this body of men; for that it is confined to matters strictly *technical.* Were we even to admit the truth of this suggestion, which we do not, a degree of moral power is left, which, though limited in terms, is any thing but contemptible. That person who counsels, and may be almost said morally to control, another in the resenting of injuries and insults, in the arrangement of family affairs, in the disposition of property at death, in the purchase and transfer of property, and in the employment and discharge of others, cannot be said to hold a niggard share of influence. Then, again, is it probable that he who enjoys this should not acquire other though less formal power? Certainly not; and thus we find that, in the patrician mansion, the busy house of merchandise, and the cottage of the small proprietor, the tried solicitor is alike a welcome guest; one whose honour and capacity, and anxious desire to promote his client's interest, are well known and fully appreciated. From the peer, who banquets his confidential adviser at his costly and elegant board, down to the simple yeoman, who carries the finest hare that falls to his lot in a season as a present to his attorney,—all the worth and respectability of the community both feel and confess the weight and estimation that should be attached to the character of the solicitor, if ably and honestly he perform his various duties. It is needless to say that to this portraiture there exist infamous exceptions; that as into every other, even the sacred profession, unworthy men have crept, so pettifoggers inflict wrong upon the confiding, and bring a too common obloquy upon all who share their name. But who, above all others, abhor the villany of such persons? Who gratuitously incur trouble and expense in guarding the inlets of the profession, in order that, if possible, the unworthy may be excluded? Who flee from any intercourse with dishonourable practitioners, as they would shun the contact of a leper? Who are most anxious and indefatigable in bringing under the notice of the courts the professional delinquencies of attorneys? The solicitors themselves. *They* suffer keenly from the reproach which, with unthinking people, attaches even to themselves in consequence of these wretches; and they, in the endeavour to abate this crying moral nuisance, have exhibited a zeal and an assiduity in keeping with the rest of their conduct. Such a course, joined to the increased discernment of persons in general, has thinned the ranks of the law-marauders: their numbers are comparatively small; their practice is on the wane; and it is much if, before long, they not be starved into honesty.

Δ.

DISCHARGE OF INSOLVENT DEBTORS.

To the Editor of the Legal Observer.

Sir,

I cannot agree with your correspondent W. P. S., as to the expediency of the legislature enacting, that from the time of filing a petition to be discharged under the Insolvent Act, no other discharge but that of the Insolvent Court shall avail the prisoner.

As the law now stands, prisoners not unfrequently, after making fruitless attempts to compound with their creditors, file a petition in the Insolvent Court. On the creditors being made aware of this proceeding, they generally prefer accepting what their debtor offers, to running the risk of obtaining an equivalent to it under his estate. The prisoner is discharged without being disgraced; and the creditors are often greatly benefited. If such a law as your correspondent suggests were to exist, from the moment of a debtor filing his petition, all possibility of his effecting a compromise with those to whom he may stand indebted would be at end. There is, however, a much greater mischief that would inevitably follow such an enactment.—Immediately after the filing of a petition, the death of a wealthy relative, or the unexpected bounty of a friend, might place the petitioner in a situation to discharge every pecuniary demand that could be made against him: would it not, then, be a monstrous injustice, if the law were to withhold from him his liberty weeks after he was entitled to it; and then refuse it, unless

supplicated for in the character of an insolvent debtor? *

To remedy the injustice to insolvents of which your correspondent complains, I would suggest that a law should be passed, enabling prisoners to remain in custody, *if they should think fit*, under a *bonâ fide* arrest, and take the benefit of the Insolvent Act, if no order to discharge them from custody had been received by the turnkey at the time of filing their petition.

T. T. B.

MIDDLESEX REGISTRY OF DEEDS.

THE hours of transacting business at this office were not stated quite accurately in our last Number (p. 24.), and we are anxious immediately to correct the mistake. The time for swearing witnesses is from eleven till one. There is also a certain time for taking away the deeds after registration. Thus, if a solicitor has to register a deed, he must make his appearance between the hours mentioned; and having disposed of that business, if he should require a deed which he left on a previous day, he must wait till the appointed time before he can receive it. We do not distinctly perceive the necessity of this regulation, but suppose it "works well!" A great number of deeds, it is urged, are brought in to be registered prior to one o'clock; but it is because the time is so short, that the crowd (if there be one) is necessarily collected.

The main point, however, is the defective state of the Index; and in addition to the remark we made regarding the arrears, we may hope that some day an improvement will be made in the entry of the names, by attending to the second letter as well as the first. We presume some useful hints might be obtained from the Real Property Commissioners, who, no doubt, would readily afford information, in order to prove the utility of their scheme of general registration.

B. B.

SUPERIOR COURTS.

LORD CHANCELLOR'S COURT.

ATTORNEY'S PRIVILEGE FROM ARREST.

How far an attorney is privileged from arrest.

AN order had been made by the Vice Chancellor, directing Mr. Dicas, an attorney, to pay a sum of money, and deliver up certain papers in his possession; and that order not being complied with, he was proceeded against for the contempt, and arrested while he was in attendance upon the Court of Common Pleas. He then applied to be discharged; and it being suggested that a petition had been presented to the Lord Chancellor, praying that the Vice Chancellor's order might be discharged, his Lordship ordered that petition to be heard before the Vice Chancellor, and the question as to the legality of the arrest to stand over till the other matter should be disposed of. The Vice Chancellor had dismissed the petition, and Mr. *Bligh* now contended that the process, upon attachment for disobedience of the orders of the Court, was in its nature a criminal process, and that the privilege claimed by Mr. Dicas did not extend to such process. That from the moment at which the order was pronounced, the party against whom it was made was supposed to be in custody; and that the warrant was not directed, as in the case of civil execution, to the sheriff, but to the gaoler, &c. He cited *Ex parte Whitchurch*, 1 Atk. 210., in which Lord Hardwicke had held such process to be executable on a Sunday, which, he said, proved the position for which he contended; because, if it had been civil process, it could not have been so executed.

Mr. *Rigby*, on the other side, insisted that the process being issued in respect of the non-payment of money, was no other in its nature and effect than civil process, and bound by all the rules applicable to other process of the same kind. The fact that Mr. Dicas was attending as an attorney on the business of his client at the time of his arrest was not disputed, and he therefore submitted that the cases in which parties had been discharged upon similar grounds must regulate the present one.

The *Lord Chancellor* said there was no doubt that the privileges of solicitors and other persons attending upon courts of justice had been established by repeated decisions; and he himself remembered, that upon the same ground Mr. Justice Le Blanc discharged a barrister, and severely reprimanded the officer who had arrested him while he was attending upon the northern circuit, although that barrister had not at the time a brief, nor had ever had, but the learned Judge said he might have one. The arrest was not on mesne process, but in execution. His Lordship said he would look into the cases, and decide the matter hereafter; but in the mean time it appeared to him that the parties were contending about nothing, because, as the Vice Chancellor had decided that the order must be complied with, Mr. Dicas, if he were now discharged, might be immediately afterwards arrested again, when he was not attending the court in his character of attorney.

On the 4th of May the *Lord Chancellor* delivered his judgment in this matter. He said the

* Our former correspondent had no intention, we presume, to commit the absurdity here imputed to him. He would, no doubt, allow a Judge to discharge the prisoner, upon payment of the debt and costs.

question regarded the privileges of attorneys, or rather of suitors, in whose right and for whose benefit attorneys were allowed these privileges. He was glad that the case had been fully discussed before him, because it was a question of great importance in itself, and because the case in Atkyns was at variance with the decisions in the courts of common law. He had examined all the authorities cited, and consulted the most experienced officers of the court; and his impression, after all this, was, that no attorney or solicitor, while engaged in actual business in any of the courts, could be arrested upon civil process, or process in the nature of civil process; but that he was entitled to the protection of his personal liberty *eundo, morando, et redeundo*. There was no doubt as to this rule in the process in civil actions; but in the present case, the process being upon attachment, it had been argued that it was of a criminal, and not of a civil nature. He denied that it was so: in its technical form, the process of attachment might be deemed criminal, but in spirit and effect it was a civil process. It had been so held in another court, in an instance where the contempt consisted in not performing an award; yet, seeing that its object was to obtain the payment of money, or the performance of some act, it could only be regarded in the nature of a civil remedy. It had been argued, that the present case differed from cases of the class to which he had alluded in two respects. First, that the process was in execution, not *mesne* process; and, secondly, in the form of the warrant, which was directed to the gaoler, and not to the sheriff or officer who usually executed civil process; that the party was considered to be in custody from the time of pronouncing the order, and he might have been taken into custody at the moment had he been present in court. In support of this view of the question, the case in Atkyns was relied on. Although at first sight that case seemed to justify the argument, it would be found to fail when minutely examined. With regard to the distinction between mesne process and process in execution, the position to be established was altogether untenable. The process for contempt could not properly be called process in execution, for the obvious reason, that no such process could issue *ex parte*, unless in the case of an undefended cause, where a party, having notice to appear, made default. The process for contempt was granted upon affidavits, and might be set aside by proving that the order, for the breach of which the process of contempt was sought, had in truth been complied with. So that to call such process a process in execution, was a gross inaccuracy of expression, not to call it an abuse of terms. He regretted that the cases which had been decided in the common law courts had not been more particularly adverted to. It was held by the text-writers, and confirmed by express decisions, that attorneys, bail, witnesses, and the parties in causes, were privileged *eundo, morando, et redeundo*. This privilege extended to attendance on the Insolvent Debtors' Court; and though there had been doubts whether it extended to the Courts of Commissioners of Bankrupts, it was now held, that it did apply to them also. An attorney was entitled to two sorts of protection: one as an officer of the court, in which character he could not be sued on mesne process, but proceedings must be commenced in another form; the other protection was, when he was employed for others in his capacity of attorney or solicitor, when he could not be arrested upon that process, upon which, when not so employed, he might be taken. This privilege, however, was not to be abused, nor used as a colourable excuse. Thus in an old case, where an attorney who had been found at a distance of forty miles from an assize town was discharged, because it was said that he might have gone there to buy a horse, or make arrangements for his client. However, in the present state of public conveyances, this excuse would probably be held inadmissible. As to the case in Atkyns, the question there did not relate to the privileges of attorneys, but whether such process as this, executed on Sunday, fell within the statute 29 Car. 2. c. 7. There the party had submitted to the process, although it had been executed on the Sunday, and he had come forward voluntarily to be taken, waiving his right of protection. The principle, therefore, did not apply; but the chief ground of Lord Hardwicke's reasoning was this;—if a party may be taken on Sunday for the non-performance of an award which has been made a rule of court, why may he not be taken on an order of this court; the statute excepting only treason, felony, and breaches of the peace? It was clear that the non-performance of an award was not a breach of the peace, and that the process issued on it was a civil process; therefore it could not be issued on a Sunday. In regard to the privilege of parliament, it as completely protected the party entitled to it from an attachment as from* a *capias ad respondendum*. In the case of *Rex* v. *Myers*, 1 T. R. 265., Mr. J. Buller had decided, that a man who had been convicted under a penal statute could not be arrested on a Sunday for the amount of the penalty. The case in Atkyns might formerly have been good law, when the Court looked only at the contempt; but it had been settled by more recent authorities, that an attachment for non-performance of an award was only in the nature of a civil execution. Since the principle relied on, and the analogy of the cases, had thus failed, he had no difficulty in now ordering the discharge of the party who had been arrested. He had consulted the Chief Justices of the other courts, and they entertained no doubt as to the practice of their own courts upon the subject; and the privileges of their courts was as high in this respect as those of this court. The order which had been under consideration in this case appeared to have been ill executed, though it had been properly obtained; Mr. Dicas having been at the time of its execution employed on the affairs of his client. He recommended the parties to apply for a fresh warrant, to avoid all objections that might be taken on the ground that the warrant already issued was spent. He

* See *Phillips* v. *Wellesley*, 1 L. O. 76., as to the arrest of a member of parliament.

would, however, add, that in case any officer of the court was found making use of his privilege as a pretext, or setting it up for the purpose of defeating the process of the court, the Court would know how to deal with such a case, and would consider such conduct a gross aggravation of the contempt. — *In re Dicas*, L. C. May 4. 1831.

On May 7. Mr. *Solicitor-General* moved to discharge an order that Mr. Dicas should stand committed to the Fleet Prison for non-payment of the sum of 56*l.*, and the non-delivery of cer tain papers within four days from the date of the former order. The demand for payment and delivery had been made by a person not authorised to give a proper receipt; and, as the practice of the court required that a permanent demand should be made by the party authorised to receive the money and papers, and as no such demand had been made, he insisted that the order had been improperly obtained; and cited *Wilkins* v. *Stephens*, 19 Ves. 117.

Mr. *James Russell* contended, that the first order having been made in January, 1830, and a demand having been properly made before the last order, and not having been complied with, there was no necessity for such demand.

The *Lord Chancellor* thought that the demand by a person duly authorised was necessary, and that the case of *Wilkins* v. *Stephens* was applicable. The order, therefore, must be dismissed with costs.—*In re Dicas*, May 7. 1831.

COURT OF KING'S BENCH.

(Before the four Judges.)

FOREIGN JUDGMENT. — ARREST. — APPEAL.

A defendant may be arrested on a judgment in a Scotch Court, although he has appealed against it.

Where a defendant was arrested in England in an action of debt on a Scotch judgment, against which he had appealed;

Follett applied for a rule to have him discharged on filing common bail, on the ground that execution on the judgment was suspended by appeal.

Parke J. You may bring an action on a judgment, although a writ of error has been issued.

Rule refused. — *Anonymous*. E. T. April 26. 1831.

PAYMENT BY MISTAKE. — PROMISSORY NOTE. — SURETY.

Where the holder of a joint promissory note made by two persons, one as surety for the other, has taken a composition from the latter, he cannot afterwards maintain an action against the surety, although, by mistake, the surety has promised to pay the balance due.

In this case the defendant signed a promissory note to the plaintiff jointly with a third person, as surety for that person. The plaintiff arrested the other person, but let him out of custody on the payment of a composition, without the consent of the defendant. He then applied to the defendant to pay the remainder of the debt, and the defendant, from mistake, promised to pay; but afterwards refused, on receiving advice that he was not liable. The plaintiff brought his action, but on this promise the jury found for defendant; and on application for a new trial,

The *Court* held the verdict right; for that the plaintiff had discharged the defendant from his liability, by liberating the other party without the consent of the defendant; and that the defendant was not bound by a promise made under a mistake as to his liability.

Rule discharged. — *Jale* v. *Wilcocks*. E. T. April 26. 1831.

ATTORNEY'S APPRENTICESHIP. — CORPORATION.

A service under articles to an attorney does not confer the freedom of the Corporation of Doncaster.

An issue was directed to try whether a person in virtue of his having served as clerk or apprentice to an attorney for seven years, was entitled to be admitted to the freedom of the borough of Doncaster. The entries in the borough books up to 1736 were general, without specifying any trade or profession. From 1736, the entries specified the trade to which the apprentice had been bound. There was the entry of the admission of an apprentice to an architect, and two entries of the admissions of apprentices to surgeons and apothecaries. The jury at the trial found for the defendants. On shewing cause against a rule *nisi* for a new trial,

The *Court* were of opinion, that the effect of the evidence was, that the apprenticeship, which entitled the person to his freedom, must be an apprenticeship to a trade. An architect, as now understood, denoted a man of science; but when the entry was made fifty years ago in the books of the borough of Doncaster, an architect, in all probability, meant no more than a stonemason or builder. And as to surgeon and apothecary, which in country towns were usually combined, there could be no doubt that the business of an apothecary was a trade. He bought and sold drugs; and in country towns he carried on the trade of a chemist and druggist, although he there often added to that trade the profession of a physician, and gave advice as well as drugs. There was nothing, therefore, to show that an apprenticeship to the profession of the law entitled a person to an admission to the freedom of the borough.

Rule discharged. — *Rex* v. *Mayor and Corporation of Doncaster*. E. T. April 25. 1831.

CARELESS DRIVING.

Where it is doubtful, from the evidence, whether an injury, for which an action is brought has proceeded from accident or carelessness, the Court will grant a new trial.

In an action for damages on account of injury sustained by the plaintiff, in consequence of the upsetting of a coach belonging to the defendants, through the negligence or want of skill of their coachman, it appeared that the coach was driven against the post of a toll-gate, and overturned; and the plaintiff, an outside passenger, was seriously injured. The jury found for the plaintiff, 200*l.* damages. The defence set up was, that the toll-gate keeper

came to the window of the toll-house with a candle at the moment when the horses came to the gate; and that the horses were thereby frightened, and swerved, and this was the cause of the accident; that the misfortune was therefore owing to unavoidable accident, and not to negligence or want of skill; and that, consequently, the coach proprietors were not liable. The defendants obtained a rule *nisi* for a new trial; and in showing cause against the rule, it was contended, that it would be dangerous to lay it down that coach proprietors should be discharged from their liability, merely by the circumstance of a man coming with a candle to the window of a house by the road-side.

In support of the rule, it was contended, that it was exactly like the case of horses starting when frightened by a sudden flash of lightning.

The *Court* thought there was doubt enough on the evidence to make it fitting that the case should go to a new trial.

Rule absolute.—*Webster* v. *Nelson and others.* E. T. April 25. 1831.

KING'S BENCH — PRACTICE COURT.

PRACTICE — RULE TO ABIDE.

Where a defendant pleads a sham demurrer, and the effect of the plaintiff ruling him to abide by his plea in the ordinary way will be to lose him a trial, the Court will oblige the defendant to abide by his demurrer, or plead such plea instanter, *as he will abide by.*

Platt applied for a rule, requiring the defendant to abide by his demurrer, or to plead such plea as he will abide by *instanter*. The facts were these:—The time for pleading was out on the 26th. At the opening of the office on the 27th, the plaintiff would have been entitled to sign judgment for want of a plea. But about five minutes before the opening of the office, a sham demurrer was delivered. The difficulty in which the plaintiff was thus placed was this. If he ruled the defendant to abide by his plea, he would have the whole of the 28th to plead a new plea. Therefore, notice of trial could not be given until the 29th. But the 28th was the last day for giving notice, so as to try within the term. The present application was therefore made by the plaintiff to avoid being thrown over the term. In Mr. Archbold's book* it was laid down, "If the defendant plead a frivolous or sham plea, the Court, on motion, will order him to abide by his plea, or plead another peremptorily on the morrow; or if it be towards the end of the term, and the plaintiff have sufficient time to give notice of trial, the Court will order the defendant, if he will not abide by his plea, to plead another *instanter*, provided the time allowed by the common rule to plead have expired; and the practice is the same as to frivolous demurrers. R. T. 5 & 6 Geo. 2.

Taunton J. Take your rule.

Rule absolute in the first instance.—*Nagee* v. *Dean.* E. T. April 26. 1831.

DESCRIPTION OF BAIL.

"Manufacturer" is a bad description of bail.

White opposed bail by affidavit on the ground of misdescription. The bail resided at Bradford, in Yorkshire, and was described as a "manufacturer." This he contended was insufficient, without stating "of what" he was a manufacturer.

Smith, in support of the bail, submitted, that as Bradford was a manufacturing town, the description of "manufacturer" was a sufficient one.

Taunton J. The fact of its being a manufacturing town is just the reason why the description is insufficient, because there is a great number of persons who would be equally entitled to such

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* K. B. Prac. vol. i. p. 142.; Tid. Prac. vol. i. p. 674. ed. 9. The origin of this practice appears to have been, that if a special plea or special demurrer be put in, and the paper book is made up and delivered to the defendant's attorney, he may, by the ancient practice of the Court, if not under terms of pleading *issuably*, strike out the special plea or demurrer, and return it with the general issue or a general demurrer. (*Anonymous*, 2 Salk. 515., *Weld, Ex. Weld* v. *Nedham*, 1 Wils. 29.) The object of the rule on which Mr. Justice Taunton acted, was evidently to prevent the delay consequent on such practice. It is to be observed, that if you move that the defendant plead *instanter*, it is done by motion in Court; if on the morrow, counsel's signature to the motion paper will be sufficient. (1 Sellon, 511., Imp. B. R. 340.) In vacation, an order may be made to the same effect by a Judge at chambers. (*Forster* v. *Snow* 2 Bur. 781.) The Master, it seems, allows the costs of this rule or order, whether the defendant abide by his plea, or plead another. (Imp. B. R. 341., 1 Sellon, 112.) *Vide* Tid. vol. i. pp. 673, 674. ed. 9., 1 Archb. K. B. Prac. p. 142.

It was formerly holden, that a plaintiff, after ruling the defendant to abide by his plea, could not sign judgment for want of a plea (*Webb* v. *Holt*, 2 Str. 1234.), although the plea pleaded be a sham plea, and palpably fictitious. (*Draycott* v. *Pilkington*, 5 M. & S. 518.; *Duberly* v. *Phillips*, M. T. 1816., 1 Chit. R. 565. *in notis.*) The ground on which Lord *Ellenborough* C. J. put those latter decisions was, "as the plaintiff has treated it as a plea, by giving the defendant a rule to abide by it, he has precluded us by the terms of the rule from treating it as a nullity. I should have been glad to have so treated it, if I could." In the case of *Thomas* v. *Vandermoolen*, 2 B. & A. 197., where the same point arose, Mr. Justice *Bayley*, on the authority of *Pierce* v. *Blake* (2 Salk. 515.), and the practice of the Court in recent cases to disapprove of such pleas, allowed the plaintiff to sign judgment as for want of a plea. He continued, "it is true that in this case there has been a rule to abide by the plea, but that makes no difference; in fact, it puts the defendant on his guard; for the rule leaves it to the party to abide by his plea or not, as he chooses; and if he abides by it, he must do so subject to all its consequences." The plaintiff cannot, however, sign judgment in such a case without application to the Court. 1 Chit. 565. *in notis.* *Vide* Tid. Prac. 674. ed. 9. and Archb. K. B. Tr. 142.

a title. If manufacturers were rare, if there were only one or two in the place, it might be otherwise.

Time was given to serve a fresh notice, as no affidavit was produced, to show that the plaintiff had been unable to find the bail.— *Fearnley's Bail.* E. T. April 29. 1831.

BAIL.

Where a defendant in distressed circumstances was arrested for a sum of 700l., the Court granted a rule to justify three bail instead of two.

Clarkson applied for leave to justify three bail in the above case, instead of two. The sum which the plaintiff had sworn to be due was 700*l.* The defendant was a very poor man, and it would be next to impossible for him to obtain two persons as bail, each of whom could swear himself worth 1400*l.*

Taunton J. That indulgence is only granted in cases of *trover*, and other cases where the sum for which the action is brought is very large. In cases where the amount is thousands, and not hundreds, as here; in some such cases I have known six, and sometimes eight, persons allowed to become bail.

Clarkson cited 1 Tidd *, where it was laid down that "in the King's Bench, where the debt is large, the Court will allow three or four persons to become bail in different sums, amounting altogether to the requisite sum." He submitted, that whether the sum was "large," or not, must depend on the circumstances of the party holden to bail. Here he was exceedingly poor.

Taunton J. enquired of the Master what was the practice in such cases.

The *Master* stated, that the usual course was, to apply to the Court for leave to justify a greater number, of persons than two, as bail; then having drawn up the rule, serve it on the plaintiff's attorney or agent, at the same time as the notice of justification. If any objection were then to be made by the plaintiff, he must urge it, when the bail came up to justify.

Taunton J. You may take your rule.

Clarkson proposed to add the terms of its being, with a stay of proceedings, until bail should be put in.

Platt, for the plaintiff, objected to this addition. Notice of *three* bail, without leave previously obtained by the defendant, had been served; they, therefore, could not justify, and he opposed them on that ground. If a stay of proceedings were superadded to the motion granted by the Court, the plaintiff would be prevented from taking an assignment of the bail-bond, which he would otherwise be entitled to do.

Taunton J. No; I think there cannot be a stay of proceedings. The defendant should have applied earlier in the term for leave to justify the increased number of bail; then he might have complied with the practice, and justified at the proper time.

Rule granted; without a stay of proceedings.— *Easter* v. *Edwards.* E. T, April 25. 1831.

* Prac. vol. i., p. 215. ed. 9.

COURT OF COMMON PLEAS.

BANKRUPT. — FRAUDULENT PREFERENCE.

Where the jury have found that a payment was not made from fraudulent preference, although the bankrupt declares that he made it to favour the creditor, the Court will not disturb the verdict, there being evidence of threats and importunities used to the bankrupt just before the payment.

This was an action by the assignees of a bankrupt, to recover the amount of a certain sum alleged to have been paid by fraudulent preference to the defendant by the bankrupt. On the part of the plaintiffs, the bankrupt was called; and he stated, that the payments had been made by him when he was on the point of bankruptcy, voluntarily, and for the purpose of protecting his father, whose name was on certain bills, the payment of which formed the ground of the action, and of favouring the creditor. On his cross-examination, he stated, he did not remember that continued importunities and threats had been employed by the defendant to him before and down to the time of the payment. He insisted that he had paid his money voluntarily, and for the purpose above mentioned. Several witnesses, called by the plaintiffs, admitted, on their cross-examination, that there had been threats and importunity employed to the bankrupt by the defendant down to the moment of the payment.

Tindal C. J., who tried the cause, left it for the jury to say whether the payment was paid voluntarily, or under the influence of threats. If it was made voluntarily, they would find for the plaintiffs; if under the influence of threats, for the defendant. The Jury found for the defendant.

After cause had been shown against a rule for a new trial,

The *Court* refused to disturb the verdict.†— *Cook and another, Assignees of* ——, v. *Rogers.* E. T. May 3. 1831.

COURT OF EXCHEQUER.

STAMP — GUARANTEE.

Where more than one consideration may be conjectured from the contents of a guarantee, it is void by the Statute of Frauds, 29 Chas. 2. c. 3. s. 4.

Assumpsit on the following guarantee: — "*Richard Ridley* v. *James Ashdown.* We, the undersigned, jointly and severally, do hereby undertake and agree to pay George C. Cole, Gent. the debt and full costs in this action, provided, on or before the 1st day of January, 1831, a sum of 11*l.* 10*s.* 3*d.* be not paid to him, the said George C. Cole, at his office, as the attorney for the plaintiff. Dated this 6th day

† See *Bayley* v. *Ballard*, 1 Camp. 416.; *Thornton* v. *Hargreaves*, 7 East, 544.; *Crosby and another* v. *Crouch*, 11 East, 256. *Park* J. took occasion to observe, that the case of *Bayley* v. *Ballard* could not be considered as law.

of November, 1830." In the margin of the guarantee there was an entry of "debt, 6*l.* 11*s.* 11*d.* costs, 4*l.* 18*s.* 4*d.*" On the trial of the cause before Lord *Lyndhurst* C. B., at the sittings after Hilary term, a nonsuit was directed, on an objection by the defendant's counsel that the guarantee was unstamped, and was, therefore, not receivable in evidence.

Montague, Chambers, had obtained a rule *nisi* to set aside the nonsuit, and for a new trial, on the ground that the instrument, being an agreement, the subject matter whereof was under the value of 20*l.*, did not require a stamp, pursuant to stat. 55 Geo. 3. c. 184. Sch. Tit. Agreement.

Cresswell, C., on showing cause against the rule, conceded the point that the instrument was admissible in evidence, though unstamped; but submitted, that the rule ought to be discharged, if it appeared that in the event of a new trial the plaintiff could not recover. He contended, upon the authority of *Saunders* v. *Wakefield*, 5 B. & A. 594., confirming *Wain* v. *Warlters*, 5 East, 10., that the consideration for the defendant's agreement was not sufficiently set forth on the face of the instrument to take it out of the Statute of Frauds, and, therefore, that an action could not be maintained upon it.

Montague, Chambers, contrà, admitted, that if, upon looking at the whole instrument, the Court could not collect or infer a consideration, the guarantee was within the operation of the statute; but he denied that, in terms, the consideration need be expressly stated. He relied upon the cases cited adversely, and the case of *Jenkins* v. *Reynolds*, 3 Brod. & Bing. 14., to show the principles upon which instruments of this nature were construed; and, in answer to an observation of *Bayley* B., that several considerations might be conjectured from the form of the instrument, other than that stated in the declaration, he referred to *Russell* v. *Moseley*, 3 Brod. & Bing. 211., and 6 I. B. Moore, 521. S. C., *Ryde* v. *Curtis*, 8 Dow. & Ryl. 62., *Newbury* v. *Armstrong*, 6 Bing. 202., wherein, as he contended, although several considerations might have been implied, the Courts had decided in support of that which was averred in the declaration.

Lord *Lyndhurst*. Various interpretations might be given to this instrument, in respect of the consideration upon which the defendant made the agreement to pay the debt and costs. It appears to me, that if two considerations may be conjectured, the agreement is not sufficient to satisfy the provision of the Statute of Frauds.

Bayley B. I do not know how, in substance, to distinguish this case from that of *Saunders* v. *Wakefield*, as the consideration averred here is very similar to what was stated in that case. There are no words to show that forbearance to proceed with the action, as in the case of *Ridley* v. *Ashdown*, was the considerations moving the defendant to make the agreement. I therefore think, that there is no consideration sufficiently expressed in this written memorandum to satisfy the object or spirit of the statute.—The rule, therefore, must be discharged.

Garrow B. and *Bolland B.* concurred.

Rule discharged.—*Cole* v. *Dyer*. E. T. May 2. 1831.

SITTINGS OF THE SUPERIOR COURTS.

LORD CHANCELLOR.

Monday,	May 23.	Motions.
	24.	Petitions and Appeals.
	25. to 28.	Rehearings and Appeals.

VICE CHANCELLOR.

May 23.	Motions.
24.	Petitions, Pleas, Demurrers, Causes, Exceptions, and further Directions.
25. to 28.	Pleas, Demurrers, Causes, Exceptions, and further Directions.

KING'S BENCH SITTINGS.

Middlesex.
Thursday, May 26.

London.
Tuesday, May 31.

COMMON PLEAS SITTINGS.

Middlesex.
Wednesday, May 25.

London.
Thursday, May 26.

EXCHEQUER OF PLEAS.

London.
Tuesday, May 31.

Middlesex.
Thursday, June 2.

*** The remaining Sittings of the several Courts in and after the ensuing Trinity Term will be stated in the Supplement on Saturday next.

MINOR CORRESPONDENCE.

COSTS BEFORE ACTION.

In your 5th Number, page 78., I perceive my Lord Tenterden is reported to have said, he had learnt from the Master, that in cases of a writ being sued out after an application for payment, he allowed the costs of that application. Now, sir, I should like to know how long he has been in the habit of doing so, because I never knew an instance of the kind, except an answer was produced, or the fact of the application admitted by the defendant's attorney, which is but seldom the case; but I confess I see no good reason why the charge should not be *always* allowed, on the assertion of a respectable solicitor, who, I am sure, would never make it for the mere purpose of exacting costs.

G. G.

COSTS OF FI. FA.

It has of late been a very common practice with sheriffs' officers, especially where they are

disposed to accommodate a defendant with time, and whose property they have seized under an execution, to return, "that the goods remain in their hands for want of buyers;" thus rendering it necessary for a writ of *venditioni exponas* to be issued. So far, perhaps, the practice may be tolerated; but, surely, a plaintiff ought to be subject to the costs of such proceedings. A case, however, has recently occurred, in which it became necessary, after a rule to return the *fi. fa.*, not only to issue a *venditioni exponas*, but also to take out a rule for its return, before the levy could be obtained, and at last, neither the defendant nor the sheriff's officer (though the effects produced were sufficient to satisfy the whole) choosing to pay the costs incident to such proceedings, it of course fell on the plaintiff to pay them. I am not aware that either a defendant or a sheriff's officer is liable to pay such extra costs; but perhaps you, or some of your intelligent correspondents, can answer the question.

G. G.

PROBATE DUTY.

A. B. bequeathed a sum of money to his executor, in trust to pay the interest to *C. D.*, his married daughter, for her life, and afterwards to pay the principal unto such person or persons as *C. D.* should, notwithstanding coverture, by *will* appoint.

C. D. died (her husband surviving), having by will exercised the power in favour of a sister and some nephews and nieces; and appointed *E. F.* her executor, who proved the same in the court of the diocese in which *A. B.*'s executor (in whose hands the money was) lived; and a probate duty was paid according to the amount of the fund appointed. Upon application to the commissioners for a return of the duty, on the ground of the fund not belonging *absolutely* to *C. D.*, the whole duty was returned. Allow me, through the medium of your valuable paper, to enquire whether the payment of duty in such cases, *in the first instance*, can be avoided? also, whether the court of the diocese, in which *A. B.*'s executor lived, or that of the diocese in which *C. D.* lived and died, was the proper court to grant probate? and what rate of legacy duty were the appointees bound to pay?

E. F.

INCLOSURES. — TITHES.

In an act for inclosing a forest and waste lands, under which the allotment should be of the same tenure as the land in right of which the allotment was made, there were the usual clauses, and a proviso that the act should not prejudice the right of the rectors, vicars, and lay impropriators of the several parishes. The different persons who claimed to be entitled to the right of herbage, &c. after the division, commenced preparing the same for the growth of corn, &c. Would an allotment of land made by the commissioners in the parish of *A.*, in right of tithe-free property in the parish of *B.*, be subject to the payment of tithe to the vicar or tithe owner of the parish of *A.*?

ARREST.

Suppose *A.* to be indebted to *B.* in a sum exceeding 20*l.*, and that *A.* has a set-off of about 10*l.*; that both accounts have been delivered, and neither disputed; can *B.* legally cause *A.* to be arrested?

AGENT. — LOSS BY FIRE.

A., the author of a book, directs his printer to place a certain number of copies in the hands of *B.*, a bookbinder, to be bound: while at the latter's premises, a fire happens, by which the copies are destroyed. Is *B.* liable to *A.* for the value of the copies so burnt?

F. G.

ANSWERS TO QUERIES IN NO. XXIX.

LEGACY. — HUSBAND AND WIFE.

1. I should consider *C.* can have no claim to the legacy as *husband* of *B.*, but must claim as administrator; as an executor or administrator of a woman that hath a *husband* shall have, by right of his *executorship* or *administration*, all actions, *rights*, *titles*, to any chattels and, POSSIBILITIES, as well which the wife had before marriage as during marriage (*Shep. Touch.* p. 452., and authorities quoted there); and, therefore, that he can have no interest in the legacy as husband, neither would an assignment by him before letters of administration be valid.

T. E.

2. "In equity, as at law, a gift to the wife is a gift to the husband, who, being bound to maintain the wife, is entitled to her property. A court of equity will, however, execute a *trust for the sole and separate use* of the wife, when the intention of the donor to that effect is unequivocally declared." — *Hovenden on Frauds*, vol. i. p. 376. *Roper on Legacies*, vol. i. p. 372.

As in this case there is no direction that this bequest should be for the separate use of the wife, the husband became entitled absolutely to his wife's interest; and he has now a vested (the bequest being of such nature) interest therein; he therefore claims in his own right; and as no administration to his wife would give him a larger interest or better title, he may assign his property as effectually without.

N.

ARTICLED CLERK.

1. *C.* should move the Court, or apply to a Judge, for a summons to show cause; but I am not aware, neither do I think, the articled clerk has any occasion to require the attorney to certify that he has faithfully served him; as I conceive that the affidavit of having duly served may be made *either* by the attorney or *articled clerk*. — (*Tidd's Practice*, p. 59.)

T. E.

2. "All disputes concerning attorneys' clerks, and their articles, or money given with them, are to be regulated by the Court." *Burton's Case*, 2 Keb. 318. *Lee's Practice*, vol. i. p. 128.

Your querist's course, I apprehend, must, therefore, be a rule to show cause.

N.

BANKRUPT'S CERTIFICATE.—SURETY.

I do not think the signing a bankrupt's certificate by a creditof would operate as a discharge of the liability of the surety; for, to discharge the surety, it appears to me there must be some act done by the creditor, which would be in effect a discharge of the debt, as by signing a deed of composition, or the like: but in this case the bankrupt would be discharged by the operation of the law; and, therefore, I humbly think this would not affect the creditor's right against the surety.

T. E.

See *Browne* v. *Carr and others*, 2 Russ. 600.

X. D.

STAMP DUTY ON LAWYERS' CERTIFICATES.

From the terms of "A Reformer's" query (L. O. vol. ii. p. 16.), I fear he labours under some misapprehension with respect to the statements contained in my letter on the duties impressed on lawyers' certificates (L. O. vol. i. p. 361.). I conceive that the lower duty attaches upon *admission*, and is payable for *three* years, and not two only, as your correspondent supposes. Except in cases of nonage, and some other instances of unfrequent occurrence, it is usual for articled clerks to get admitted as soon as their articles have expired, whether they intend to practise directly or not; but they do not, of course, take out a certificate until they commence business on their own account. But the querist (for complete satisfaction) had better refer to 37 Geo. 3. c. 90. § 26. 28., 54 Geo. 3. c. 144. § 13, 14., and 55 Geo. 3, c. 184. sched. part 1.

G.

MISCELLANEA.

SIR JOHN FORTESCUE

Sir John Fortescue has been called the chancellor of Henry VI. He, however, never exercised the office in England. The highest office which he ever actually exercised was that of Chief Justice of the King's Bench, in the year 1442, in which he is highly commended by the most eminent writers, for the wisdom, gravity, and uprightness with which he presided in that court for many years. He remained in great favour with the king, of which he received a signal proof, in an unusual augmentation of salary; and, indeed, in the court of Henry VI., was a principal counsellor, and faithfully adhered to the interests of that unfortunate monarch. When the success of Edward IV. obliged Henry to take refuge in Scotland, Sir John Fortescue attended him; upon which occasion it was, probably, that Henry created him Chancellor of England. But, in the mean time, Sir John was attainted of high treason by Edward's parliament in 1461, in the same act in which Henry VI., Queen Margaret, Edward their son, Henry Duke of Exeter, Henry Duke of Somerset, Thomas Earl of Devonshire, Jasper Earl of Pembroke, and, in the whole, one hundred and fifty three persons, were attainted for their adherence to fallen power. Another person (Sir John Markham) was appointed Chief Justice in his stead; and he was never acknowledged Chancellor by the party.

Fortescue was, throughout his life, a lover of polite literature; one instance, among many, how compatible are the pleasures of intellectual taste with great legal eminence. Worthily was he styled by Sir Walter Ralegh, "that notable bulwark of our laws;" and, indeed, never any author took more pains to secure them both from the ambition of princes and the passions and vices of private men. To this end, he is careful, in his *De Laudibus Legum Angliæ*, to insinuate, that however absolute some continental constitutions might be, yet such were impracticable in an island.

Sir John Fortescue adduced the first settlement of Brutus in this country as evidence of a social contract for the institution of our government. Concerning the different powers which kings claim over their subjects, he was firmly of opinion that they arise solely from the different natures of their original institution. "So," says he, "the kingdom of England had its original from Brute, and the Trojans who attended him from Italy and Greece, and became a mixed kind of government compounded of the regal and political." And whatever doubts may attach to the story in the mind of a critical historian, he, as a lawyer, was justified in supposing its truth. Edward I., when endeavouring to establish his claim of subjection from Scotland, adduces, in a letter to the pope, the whole history of the arrival of Brutus, as a solemn proof of the direct and superior dominion of England. Old chroniclers and historians seldom trouble us with any doubts on the subject. Allusions have been made to the events recorded by Geoffrey in state papers and acts of parliament; and it has taken strong hold on English belief. It was, however, not necessary for him to affirm the story to be true. It may be produced as an instance, which, upon the supposition of its truth, is very apposite; though, whether it be really true or not, is no ways material to the argument, and may be left to every man's opinion. Besides, the lawyers of his day held that the laws of the Britons were never cancelled, but subsisted always; and that the common law has been from the creation of the world, for it is common reason.

JUDGE CATLINE.—MR. BROMLEY.

Mr. Bromley, solicitor, giving in evidence for a deed, which was impeached to be fraudulent, was urged by the counsel on the other side with this presumption;—"That in two former suits where title was made, that de l was passed over in silence, and some other conveyance was stood upon." Mr. Justice *Catline*, taking in with that side, asked the solicitor—"I pray thee, Mr. Solicitor, let me ask you a familiar question: I have two geldings in my stable; I have divers times business of importance, and still I send forth one of my geldings, and not the other; would you not think I set him aside for a jade?"—"No, my Lord," said Bromley; "I would think you spared him for your own saddle."—*Bacon's Apophthegms.*

The Legal Observer.

Vol. II. SATURDAY, MAY 28. 1831. No. XXXI.

——— "Quod magis ad nos
Pertinet, et nescire malum est, agitamus."
HORAT.

LAWYERS IN THE NEW PARLIAMENT.
No. II.

We shall resume the account which we lately gave of the lawyers who have been returned as members of the new parliament.* We have often heard it remarked of late years, that our own profession, with one or two exceptions, has very little to say for itself in the House, except on professional topics. At one period, certainly, the lawyers took a much wider field in debate than they now do. The Attorney General and Solicitor General of the time were always accustomed to defend every measure of government, and oppose all the attacks of the opposition. We have plenty of evidence of the exertions of Lord Mansfield, when Solicitor and Attorney General, in this way: and in later times, many particular efforts of lawyers in the House of Commons are still remembered. The speeches of Lord Loughborough, when Mr. Wedderburn, on the expediency of garrisoning Gibraltar with electoral troops, is still quoted and remembered; and many other similar efforts might be mentioned.

Lord Eldon was the first, perhaps, to break through this rule. He very rarely spoke, when in the House of Commons, on any but legal or strictly constitutional questions. His first speech of any importance was on Mr. Fox's India bill, on which he greatly distinguished himself. The speech was a singular one; and ended, as far as we remember, by a request to have permission to *take the bill home, and to deliver his final opinion on a future day.* His great effort, however, in the House of Commons, was on the Regency question, the defence of which rested mainly upon him. His speeches in the House were, however, decidedly forensic. His voice was low, his manner unassuming, but steady and deliberate. When Chancellor, his manner of speaking was altered considerably. Many of his speeches were deficient neither in fire nor energy. His attitudes were frequently quite oratorical, and his style sometimes declamatory. His final efforton the Catholic Relief Bill will not easily be forgotten. There was a pathetic earnestness in some parts of it that was extremely impressive and affecting, particularly when, in the midst of his most energetic harangue, he altered his tone, and turned round to Lord Holland, who was whispering to Lord Melbourne, and besought him to allow him his attention for one short hour, as it would be long before he should again make such a request. He then rose again to his former energy of address; and when he declared that he "should go below that bar with the firm conviction, if he went alone, of having done his duty;" the effect, in spite of the triteness of the words, was very great on all who heard him.

We may at some future period collect the distinguishing traits of all the lawyer-politicians of this century. At present, however, we shall content ourselves with concluding our account of those in the present parliament.

Since our first article on this subject was written, several other members belonging to our own profession have been returned. Mr. *Pemberton* is one of these. He comes in against the bill. We do not think that he is calculated to make much impression on the House, if he carries there his forensic habits. His manner is too quiet and unassuming to command attention in that noisy *arena*, although his sound sense and flowing delivery well entitle him to it. The support which the anti-reformers will receive from Mr. *Frederick Pollock*, Mr. *Knight*, and Mr. *Pemberton*, will be the more valuable from the circumstance that many of the leaders of that party among the country gentlemen have not been returned.

Dr. *Lushington* will be found in his place

*See *antè*, p. 17.

as the advocate of the bill. His support is always valuable, as well for the soundness of his reasoning as the graceful manner in which his speeches are delivered.

Mr. *Burge con.*, and Mr. *Petit pro*, may also be classed together. They will neither of them speak — they will attentively listen, and resolutely vote.

But it is not the bar alone that is represented in the House of Commons. There are at least three members of the other branch of the profession.

Mr. *Wilks* deserves to be mentioned as the constant and steady friend of the principles which he supports. He possesses very considerable powers as a public speaker, and votes, of course, for the bill. Mr. *Freshfield* is an anti-reformer. He is a ready and able speaker, quick and clear. We hope he will address himself to this question.

There is also another solicitor in the House, Mr. *Whittle Harvey*. He is, we believe, for reform; but until we see his name in the division, we are never certain of the side which he will take. It is fortunate for him that he possesses talents to clear him from the scrapes into which his waywardness leads him. It is likely he may force a hearing on this question, and then we shall be certain of having one of the best speeches in the House.

But while England has been forward in sending lawyers to her senate, the sister kingdoms have also been active in the same cause.

The *Lord Advocate* will no longer need the suffrages of an English borough. He has been returned without a contest for a very populous district in Scotland. We are happy to see it. His was one of the few speeches in the late debate which really grappled with the difficulties of the question. We are anxious to hear him again. His predecessor, and Mr. *Kennedy*, are also returned. It is, however, a little surprising that the Scotch bar is so little represented in the House of Commons. When it is remembered that for a long series of years it has been well known to possess talents of the first order, it has always appeared to us strange that we did not see more of its members as British senators.

Ireland will furnish at least her proportion of the legal representatives of the country.

The present solicitor general, Mr. *Crampton*, we have never yet heard. We are not, therefore, able to give any opinion on his qualifications as a speaker for his office.

On the side of reform we have two able men, whom we have been long accustomed to see and hear together, Mr. *O'Connell* and Mr. *Shiel*. They have both spoken well on this question. They have been both too often described to need any further mention here. On the other side is Mr. *North*. Since the time of Mr. Canning, there is hardly a speaker in the House who attends to all the *minutiæ* of rhetoric except this gentleman. Every thing is prepared with the greatest particularity — voice, tone, attitude, gesture. His speeches are all elaborated with the greatest care. If he could command entire attention they would be much more effective than they are; but his fine points are lost in the noise and confusion of so crowded and boisterous an assembly. Mr. North, however, is undoubtedly one of the few remaining orators in the British senate.

Here we shall close our account.

THE UNIVERSITY OF LONDON. — LAW CLASS.

LECTURES OF MR. THEOBALD ON THE LAW OF PRINCIPAL AND SURETY.

No. V.

Doubtful Questions.

In his fifth lecture Mr. Theobald discussed the questions, whether a covenant not to sue, given by a creditor to the principal debtor, will discharge the surety; and whether, in case the principal debtor gives his creditor a bill of exchange to which the surety is not a party, the surety is discharged by such laches on the part of the creditor as would undoubtedly discharge him if he were a party. Thirdly, Mr. Theobald exemplified the application to the contract of bail of all those grounds of discharge which he had already illustrated with reference to the case of common sureties; and under this head he minutely discussed the recent decision of the case of *Roche* v. *Stevenson*, and pronounced that decision to be untenable. In following these divisions, we must request our readers to recollect that all we can give is a bare sketch of the lecture.

With relation to the first question above proposed, Mr. Theobald commenced by a statement of the doctrine of law concerning covenants not to sue, as contained in *Lacy* v. *Kynaston*[a], *Dean* v. *Newhall*[b], *Hutton* v. *Eyre*[c], and *Morley* v. *Fryer*.[d] The substance stated was, that a covenant not to

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[a] 1 Lord Raymond, 690. [b] 8 Term R. 168. [c] 6 Taunt. 289. [d] 6 Bing. 547.

sue, if given to a sole debtor, has the same effect as a release, and like a release may be pleaded in bar of any action, to enforce the original obligation; but if given to one of several joint debtors, the law presumes its intention to be to discharge the one only, and to reserve the liability of the other debtors; and therefore in such a case the covenant operates, not as a release, but as a covenant merely, for the breach of which the covenantee has an action, but is still liable on his original obligation, jointly with the co-debtors; but Mr. Theobald contended, that where one of the co-debtors is a surety, the principles of the surety's contract introduce, at least in equity, a qualification of this doctrine. And he proceded to discuss the case of *Dean* v. *Newhall*, in which Lord *Kenyon* had overlooked the application of those principles. In that case the defendant was bound with one Taylor as surety in a joint and several bond, conditioned for the payment of a sum of money, which was not paid, and for which the bond was put in suit. At the trial it was proved that after the bond had been forfeited, Taylor the principal became insolvent, and assigned his effects to trustees for the benefit of his creditors, of whom the plaintiff was one, and in the deed the creditors covenanted not to sue Taylor, and that if they did, those presents should be a sufficient release and discharge to all intents and purposes both at law and equity. The counsel for the defendant contended, that this covenant operated as a release, and consequently discharged the defendant: but the Court decided the contrary; and Lord *Kenyon* said, "Even if the defendant had succeeded at law, a court of equity would have given the plaintiff full relief;" by which, added Mr. Theobald, it seems His Lordship must have meant, that if a covenant not to sue the principal discharged the co-obligor, a surety, at law, it would not discharge him in equity; but, on the contrary, equity would relieve the creditor from the effect of his covenant, and reimpose the original obligation on the surety. The lecturer, however, argued that this statement of the doctrine of equity was a mere *obiter dictum*, and was not entitled to much weight, since Lord *Eldon*[a] said, in allusion to this very case of *Dean* v. *Newhall*, that the doctrine of law being as therein decided, it raised a question whether equity would not discharge the surety,—a question, the suggestion of which evidently implies the opinion of Lord *Eldon* to be the reverse of the dictum delivered by Lord *Kenyon*.

In *Hutton* v. *Eyre*, in which the defence rested on the fact, that the creditor had covenanted not to sue one of the debtors, it appeared that both the debtors were principals; and therefore, the case is not, Mr. Theobald argued, in point, as to the effect of a like covenant, where some of the debtors are not principals but sureties; and though at law a *quasi* debtor, that is one who, though in fact a surety, has contracted in form as a principal, may be estopped from showing his real character, yet in equity the estoppel is not admitted; but such *quasi* debtor, if known by the creditor to be only a surety, is regarded as a surety, and is entitled, notwithstanding the form of his obligation, to the benefit of the principles peculiar to the contract of surety. Seeing, therefore, that the *dictum* of Lord *Kenyon* stands unsupported, and that Lord *Eldon* has regarded the question proposed above as an open one, its decision can be obtained only by a reference to principles: and, first, one principle of equity is, that the surety is discharged if the creditor fails to perform, or disables himself from performing, any of his obligations towards the surety. Now, is a covenant not to sue the principal inconsistent with any right recognised to exist in the surety? The lecturer answered, It is: for one right which the surety has, is that of going into equity to compel the creditor to sue the debtor; and as equity would never compel the creditor to sue the debtor contrary to his covenant not to sue him, it follows equity must hold, that the creditor has disabled himself from performing this obligation to the surety.

Farther, an agreement to give the principal time discharges the surety. Now, were the creditor to covenant not to sue his debtor for twelve months, would not that be in effect an agreement to give time? And if so, a covenant not to sue, where no time is mentioned as the duration of forbearance, is an agreement to give time indefinitely; and as the surety is discharged by the creditor's agreeing to give the debtor a day, *a fortiori* he is discharged by the creditor's agreeing to give FOR EVER.

In *Hutton* v. *Eyre*, *Gibbs* C. J. remarked, that if a creditor gave a covenant not to sue, when it was as easy to give a release, which would be much shorter, his preference of the covenant arose from an intention to reserve his right to proceed against the other solvent co-debtors; as to which Mr. Theobald replied, that it was well set-

[a] See *Mayhew* v. *Cricket*.

tled, that a reservation of the right to proceed against a surety is void, if the creditor has done any act, which, without such reservation, would have the effect of discharging the surety.

There may, Mr. Theobald added, be other considerations to the same effect; but these, he said, were sufficient to warrant the conclusion, that the question proposed, and which is yet undecided, will, when brought before a court of equity, be decided affirmatively; namely, that a covenant not to sue one of several joint debtors, or not to sue a principal debtor, will discharge the surety in equity, and at law also, except in those cases in which the surety having contracted *quasi* a principal, is estopped from showing that he is a surety.

As to the second question proposed, Mr. Theobald reviewed the cases of *Warrington* v. *Furbor*,[a] *Phillips* v. *Astlino*,[b] *Murray* v. *King*,[c] and *Holbrow* v. *Wilkins*,[d] the two first of which, he contended, are at variance with one another, when considered with reference to the premises on which the respective judgments were based; though not so, he said, when considered with reference to their respective facts collectively, and certain distinctions between them sufficiently obvious, but which have not been adverted to. The real question in the first case was, whether the plaintiffs who were surety for the defendant's debt were discharged from their liability by the creditors neglecting to present to the defendant for payment a bill which he had previously accepted on account of that debt; and *Lord Ellenborough* decided that he was not discharged by the circumstance of its non-presentment; because, he was not a party to the bill, and amongst other grounds also, because the surety insures, as it were, the solvency of his principal, the acceptor: which, however, Mr. Theobald observed, was no reason at all, but rather a *petitio principii;* for if a surety is an insurer, then, like any other insurer, he is discharged, unless the assured performs the obligations entailed on him by that relation; and the very question in dispute is, whether presentment of the bill was an obligation which the assured was under towards the surety or insurer. In *Phillips* v. *Astlino*, the question before the Court of Common Pleas was precisely the same as that in *Warrington* v. *Furbor*, and the Court held the reverse of the judgment of the Court of King's Bench; namely, that the non-presentment of the bill had discharged the surety, though he was not a party to it. In the next case of the kind, *Murray* v. *King*, the Court of King's Bench evidently felt this antinomy between the two last cases to be a difficulty; but the Court evaded the general question, and decided that in that case the non-presentment of the bill could not have the effect of discharging the surety, because it appeared to be the particular intention of the surety's contract to secure the creditor at all events, and even against the possible effect of his own laches. In *Holbrow* v. *Wilkins*, the defendant was a commission-broker, and had guaranteed to the plaintiff half the price of certain wool which he had sold for them, and for which the purchaser had accepted a bill at six months. This bill when due was not presented for payment, in consequence of the insolvency of the acceptor; and the defendant contended that he was discharged in consequence of the non-presentment; but the Court decided the contrary. To which decision *Bayley* J. arrived on the ground that the defendant was not a party to the bill; and *Abbott* C. J. on the ground that the defendant had had notice before the bill was due that the acceptor was insolvent, and that the plaintiffs would look to him for payment. But Mr. Theobald remarked that this decision, and the grounds stated, were equally unsatisfactory; for as in the event of the bankruptcy of the acceptor, the holder of a bill is still bound to present it,[e] when due, in order to avail himself of it against the indorsers; and consequently notice to the indorsers that he should look to them would not excuse a non-presentment, therefore notice to the surety of the insolvency of the acceptor would not excuse a non-presentment of the bill, so as to entitle the creditor to resort to the surety, if the creditor was ever under the obligation as towards the surety to present it,—and whether he was so, is a distinct and previous question, which the Court does not seem to have entertained,—and the answer to which depends on the general principles of the surety's contract. And with reference to those principles, Mr. Theobald, premising that the law was in the greatest confusion and uncertainty as to this point, maintained that the law ought to be as follows:—namely, that wherever the principal himself as a party to the bill would be discharged from the debt, by reason of the laches of the creditor to perform any obligation which he was under in respect of the bill, the surety would be discharged also; unless, as in *Murray* v. *King*, an intention

[a] 8 East, R. 242. [b] 2 Taunt. 206.
[c] 5 Barn. & Ald. 165. [d] 1 Barn. & Cres. 10.

[e] *Russell* v. *Langstaffe*, Doug. 515.

appears that the surety should be liable, notwithstanding the laches of the creditor. For example, said Mr. Theobald, where the principal is not the acceptor but an indorser, the non-presentment of the bill for payment ought to be held to discharge the surety, for two reasons: first, that it would discharge the principal himself; for, if the holder of a bill neglect to present it to the acceptor, he discharges the drawer and indorsers: and secondly, because the surety is injured by such laches; for, as the surety on paying the debt is entitled to have the benefit of all collateral securities held by the creditor, so, as the non-presentment of the bill destroys its value as against the indorsers, the surety is deprived of the benefit of the bill, and is injured to the extent of its value. And on these grounds, *Phillips* v. *Astlino*, and *Warrington* v. *Furber*, though hitherto considered to be antinomous to one another, are consistent, and were both correctly decided. For in the latter case the principal was not discharged according to the law-merchant by the non-presentment of the bill, because he was the acceptor; but in the former the principal was discharged by the non-presentment, because he was the drawer.

In conformity with the above view, Mr. Theobald argued, that it ought to be admitted as a general rule, that all the obligations which the creditor is under in relation to the debtor, must be performed in order to charge the surety; unless, as in *Murray* v. *King*, they have been waived by the surety. Our limits will not allow us to enlarge any further on this part of the lecture.

In the next place, Mr. Theobald exemplified the application to the case of bail, of all those grounds of discharge which he had stated in the case of common sureties. The greater part of the substance of this portion of the lecture has already appeared in our columns, in articles supplied by Mr. Theobald, respecting the case of *Roche* v. *Stevenson*, and to those articles we refer our readers.*

In conclusion, Mr. Theobald, announced his next lecture to be, 1. Of the remedies which the surety has against his principal. 2. Of the interest which the surety has in collateral securities held by the creditor. 3. Of contribution, or the rights which exist as between co-sureties. A sketch of this lecture we hope to be able to give in our next or some early Number.

* See Vol. I. pages 191. 219. 282.

HINTS TO PRACTITIONERS.

No. II.

1. ON COLLECTING AND INVESTIGATING FACTS AND CIRCUMSTANCES.

THE greater part of a solicitor's business, as well as the successful termination of any action, suit, or other proceedings in which he is engaged, depends upon a thorough knowledge of every fact and circumstance connected with it. Hence the collection and investigation of facts and circumstances are of the very first importance; and indeed, without a diligent discharge of his duty in this respect, no success can reasonably be expected. The practitioner who exerts his abilities to the utmost to collect and methodise the facts and circumstances connected with a business, committing them to writing in *a full and complete manner*, and with *a due regard to order and to dates*, will find all complexity and difficulty avoided, excepting such questions as may arise with reference to the law.

A careless and superficial manner in collecting the materials and particulars of a case, mark the negligent, indolent, or indifferent solicitor or clerk. Some men attempt to prepare instructions, cases, briefs, &c. before they have made themselves *well acquainted* with the whole of the details, and before they have read through the papers, correspondence, and documents: the consequence of which is, that they prepare a crude, indigested mass of disorder and confusion, disgracing themselves, and defeating the object proposed.

In the collection, investigation and narration of facts and circumstances, first look to the object or end in view; and then, commencing at the foundation, proceed most minutely in following up the whole subject in a regular train—taking care not to leave out any link in the chain, however trifling it may appear. It is inconceivable what facts and circumstances will crowd upon the mind if they are narrowly and clearly investigated and pursued—more especially when dates are attended to, and a true discrimination made. Solicitors and clerks, who do not take the trouble to analyse and arrange facts, papers, letters, and documents, can have no clear conception of the subject, but are left in total darkness, and commit the grossest mistakes.

It should be borne in mind that, generally speaking, clients are meagre in their communications, and therefore it is the more important to sift and follow out every point and particular connected with the subject. One fact or circumstance leads to

another, and so on until you arrive at a clear and satisfactory conclusion. Be therefore most anxious and most desirous of collecting and investigating, and then in arranging and narrating the facts and circumstances in every business in which you may be engaged.

To old causes, or business which has lain dormant, the foregoing observations particularly apply; and in reviewing such causes or business, every fact and circumstance connected with the case, and all the papers, and proceedings, should be adverted to.

2. ON PREPARING CASES AND STATEMENTS FOR COUNSEL.

In the preparation of cases and statements, it is recommended to commence with the description of the parties, and the claim, and then to state the points of the case on both sides of the question to be proposed. By doing this, counsel will the more readily scrutinise the facts of the case as they proceed to peruse them. The facts should be next narrated, and the same order and accuracy observed as in the preparation of the narrative part of a brief (to which we shall presently advert); and, in order to prevent counsel from being misled, take care to notice any statement, the proof of which is doubtful, or cannot be established.

As the opinion of counsel will depend on the facts stated, and as all subsequent proceedings may be grounded upon the opinion, too much pains cannot be bestowed in collecting the facts, and stating them fully and accurately in the case. If, after the facts are stated, it should be necessary to refer to or remark upon any decisions, this should be done before putting the questions. Be particular in framing each question so fully and accurately that counsel may have no difficulty in comprehending that which is asked of him, and in writing an answer which will be satisfactory to the client; the questions should be shaped so as to be understood, without a reference to the body of a case, for counsel cannot be expected to travel out of the questions proposed, and to this point, therefore, attention is requisite.

Barristers of eminence being incessantly occupied in business, the only method by which their early attention can be called to a case is, by appointing a consultation or conference with them; at which it will be found that they adhere strictly to the questions set down in the case, and which alone they answer, although you may have the opportunity of collecting from them the reasons on which the answers are founded,

3. ON PREPARING BRIEFS FOR THE TRIAL OF AN ACTION.

As a matter of course, the practitioner will commence with stating the title of the cause, and the court in which the action is brought, and the party for whom the brief is held.

He will also abbreviate the whole of the pleadings, marking distinctly the issues joined, and taking care to keep the averments or statements in the pleadings so separated from each other that they may be clear and intelligible; and he will of course note the distinction between each count or plea.*

These preliminary matters will be followed by a description of the parties, and their residence; next the nature of the action will be described, the plaintiff's claim, and the grounds of it.

Then the questions likely to be raised and contested, and the points made by the plaintiff, to which may be added the names of any cases bearing upon the several questions.

The defence or probable defence, and if more than one head of defence state each separately, with a reply to the defence or to each head of defence.

A full and complete narrative of the facts of the case should then be given, for the most part in chronological order, stating shortly the substance of any letter or written document of importance, and then setting it out verbatim. In the course of the narrative, draw attention to and make remarks upon any fact or circumstance material in the case, but let it be so done as not to break the chain of the narrative.

A general outline of the evidence, which will be produced in support of the case; and if there be any deficiency, or any part of it be liable to objection, notice it, and remove the objection by argument, or by reference to cases if possible.

If necessary, set out shortly any cases bearing upon the question in the cause.

Should the case of the defendant call for more particular investigation than will be contained in the reply to the defence, or should the witnesses likely to be produced by the defendant, be of so much

* After briefing the pleadings, and perusing and arranging all the papers thoroughly, it is then most important to examine the witnesses personally with the greatest minuteness; afterwards draw a statement of their evidence; and, lastly, proceed with the other parts of the brief.

importance as to make a scrutiny of their evidence necessary, let such scrutiny be entered upon with great care and caution, so as not to mislead counsel.

Detail the evidence or proofs most particularly, always adverting to the pleadings, and pointing the proofs so as to support every statement or averment contained in them, and observing chronological order as much as possible. Let the evidence be set out at length, although it may be a repetition of what has before been set out in the narrative, in order to enable the counsel to examine each witness from the proof, without turning to other parts of the brief. If any thing particular be necessary to be observed as to the character, ability, ignorance or cunning, of any of the witnesses, or their hostile feeling, or the bias of their mind on any point most likely to fix their attention, be careful to detail it in a note at the end of such witness's evidence.

Under the head of cross-examination of the defendant's witnesses, state who they are, and what it is supposed they will be called to prove; and show, if it can be done, the fallacy of their evidence, and how it may be rebutted; and state any facts which are likely to be drawn from them favourable to the plaintiff's case, or any likely to overturn such parts of their evidence as may be favourable to the defendant. If any legal objection exist as to the admissibility of the evidence, state it, and the grounds upon which it may be supported.

ON IMPROVING COUNTY COURTS.

It would require more attention and space than we can at present afford, to trace the various causes of the declension of the ancient local courts of the kingdom; and the investigation would be more curious as a piece of antiquarian research, than useful to our present purpose. The business of Westminster Hall has for centuries been increasing, in spite of the fees demanded, and of right payable (as it is insisted) to sundry patent and other officers and their deputies, sometimes for filing a piece of paper or parchment, marking a document with a seal dipped in ink, entering a name or two in a book, for inspecting a book, and for performing a variety of other useless or insignificant services. These charges, indeed, are in the aggregate so burdensome and unreasonable, that more than one half of the costs of an action now consists of money actually disbursed out of pocket. The people know and feel this, and, in consequence, rather suffer wrong than seek their rights at so great a price. There can be little doubt, that ere long all needless fees to legal sinecurists will be abolished, to the great benefit of the subject, and the promotion of the ends of justice. The courts of Westminster Hall will then rise in public estimation, and their functionaries attain more real dignity than they have ever yet possessed, unless, indeed, they be unfortunately depressed by ambulatory judicatures of law, equity, arbitration, reconcilement, and judicial advice.

Looking, however, at the immense increase of trade, and the change in the value of money, in comparison with former times, it must be owned that the people are in want of some more suitable tribunals for the determination of small matters, than those which exist. But we cannot admit that they require the introduction of either Scotch, Danish, or any other foreign juridical establishments, however eloquently they may be exaggerated and extolled. In this respect, the promoter of the Local Court scheme seems to have mistaken the habits and character of our countrymen. They will be content with nothing but open and impartial trial by a competent Judge and jury of twelve men. Many suits are still disposed of in local courts, especially in county courts. These courts are ancient and familiar to us. If an experiment is really to be tried, why should not these courts be regenerated? This might be effected with little trouble, and at a very moderate expense; for the county courts possess buildings, officers, and machinery which might at once be called into operation. The principal difficulty is to find Judges of learning, integrity, and decision of character, to infuse life and vigour, and inspire respect for each county court. Should their labours give satisfaction to the people upon a fair experiment, and a greater number of judicatures were still considered necessary, which is very improbable, it would only be needful to extend the same system to the different hundreds, wapentakes, and districts, into which English counties are divided. Hence, the inhabitants would have courts of justice nearly at their doors, as in former ages, but conducted upon improved and systematic principles. Trivial suits ought not to be carried on in the courts at Westminster. Their jurisdiction has long been limited to suits of forty shillings and upwards; that limit ought now, we submit, to be ten pounds and upwards. Actions would, unquestionably, be multiplied in the county courts, and barristers and attorneys practising there would not be considered of so respectable a grade as those practising in Westminster Hall. But then, let it not be forgotten, the people lack justice, and crave legal tribunals to adjudicate in matters of small amount, with more facility and at less cost than law business can be transacted in the present supreme courts. These necessary wants should be supplied to an industrious population in the best way that can be devised, and without introducing forms and systems of jurisprudence which are alien to us. We say, remodel, and improve the ancient county courts, and make them accord with the principles and practice of the common law, so familiar and highly esteemed by the people. You will then gradually withdraw from the Westminster courts inconsiderable suits, without danger to the systems of law and equity which have in the course of centuries been established amongst us.

Improved county courts would relieve the superior courts from petty suits, and increase

their dignity; many that go without justice would obtain it in the courts below, and the people would be satisfied. It is unreasonable that men should be compelled to abandon their rights on account of the serious expense attending a suit in Westminster Hall. A suitor there for 10*l.* cannot expect to obtain much, even if he succeed in his cause: and if he fail, he may be ruined.

Having stated thus much, we shall suggest some propositions for improving county courts, in order to make them useful and effective.

1. The courts at Westminster shall not hold plea in any action under 10*l.*, except where the title of freehold comes in question.

2. The county court shall be a court of record.

3. In every county court there shall be a barrister or solicitor of seven years' standing, to preside as Judge. He shall be appointed by the crown, and have a clear salary of 800*l.* per annum.

4. Where the sum demanded does not exceed 10*l.*, the cause shall not be removable, unless upon oath made that the title of land will come in question; and if upon that suggestion, the cause be removed by either party, and upon the trial it shall appear untrue, the superior court may deprive the party removing the cause, of his costs, or order him to pay costs.

5. The Judge, with a jury of twelve men, qualified to serve as jurors in the superior courts, shall, according to the course of the common law, hear and determine all causes of which the courts of Westminster have cognizance, where the debt or damage shall not exceed 10*l.*, and where the title of freehold comes not in question.

6. Where a verdict shall be given for a plaintiff for less than 20*s.*, he shall be entitled to no more costs than damages, unless the Judge certify that he ought to be allowed full costs.

7. Besides hearing causes at the county town, the Judge shall make four circuits in a year to try causes at the chief towns in the county.

8. The sheriff, undersheriff, bailiffs and officers shall attend the Judge upon the trial of causes in the county court and on circuit.

9. The mesne process of the court shall be by summons, attachment, and distringas; and the execution by *fieri facias*, *levari facias*, *elegit*, and *capias ad satisfaciendum*, which shall be executed by the sheriff.

10. The county clerk shall be the sworn chief clerk of the court, to issue process, file and enter proceedings, keep the records, tax the costs of suitors, &c.

11. Barristers and attorneys, qualified to practise in the King's courts at Westminster, may practise in the county courts, and no other persons: and attorneys may act as advocates.

12. The courts at Westminster shall have the same power over the county court, as they now have over inferior courts, by attachment, mandamus, prohibition, &c.

GENERAL RULES OF COURT.

POWERS OF THE JUDGES UNDER 1 W. 4. C. 70.

By 1 Wm. 4. c. 70. § 9. it is enacted, *that in all cases relating to the practice of any of the Courts of King's Bench, Common Pleas, or Exchequer, in matters over which the said Courts have a common jurisdiction*, or of or relating to the practice of the Court of Error before mentioned, it shall be lawful for the Judges of the said courts jointly, or any eight or more of them, including the chiefs of each court, *to make general rules and orders for regulating the proceedings of all the said courts*; which said rules and orders so made shall be observed in all the said courts; *and no general rule or order respecting such matters shall be made in any manner excepting as aforesaid.*"

The Court of Exchequer, in last Michaelmas term, made certain general rules and orders to regulate the proceedings in that court, and the Court of Common Pleas in last Easter term also made certain general rules and orders for the regulation of the proceedings in that court.

Are these general rules and orders valid? * T. K.

DISPUTED DECISIONS.

Of the three cases which were discussed under this head in No. XXV., (Vol. I. pp. 392—5.) the first only has produced any particular controversy. The subject, — that of "trespass for shooting a dog," — is not, perhaps, of sufficient importance to prolong the contest; but we select from several letters the following passages, which we trust will dispose of the question. We do not think it will be instructive to our readers to lay before them those parts of the correspondence in which the argument turns upon points rather bearing on the verbal accuracy of the disputants than the true matter at issue. We therefore confine ourselves to the analogous cases which are adduced to illustrate the question.

"There is no law to prevent a man from keeping a tiger, or any animal, how ferocious soever it may be; but if the beast escape and do damage, the owner must answer for it at law. If he may permit such an animal to live, *à multo fortiori* he may permit to remain alive a dog which had a tendency only to an illegal mode of gratifying his appetite.

"It is argued that animals *mansuetæ naturæ*, if they lose that tameness which made them property, become again completely *feræ naturæ*, and therefore may be killed. Supposing this argument to be well founded, it may be demanded, what acts amount to a cessation, or to "a breaking through of this tameness." Instance the case

* The doubt raised by our correspondent would be very serious if any of the general rules made by the judges of a single court apply to matters over which the courts have a common jurisdiction. — Ed.

of an old hunter, which always, when sent to grass, leaped the fences, and got into the neighbours' corn; according to the argument in question, the owner of the corn would be justified in shooting him.

"To the case of the horse all the observations apply with equal force as to that of the dog. Is it "reasonable that the defendant should be constantly, by night and day, watching his *field* to protect it from the predatory attacks of the plaintiff's horse; or must the defendant be perpetually involved in law for every successive injury the horse might occasion?"

M. M. T.

Much reliance is placed upon *Lee* C. J., having said in *Smith* v. *Pelah**, that the owner of a dog who knows it has once bit a man, ought to have hanged the dog on the first notice; now your correspondent thence infers, that if the owner does not so hang the dog, any one else may kill him. But the only penalty attaching to the owner's failure to kill the dog, will be that which attached to him, viz. that the owner will be liable to make good in damages whatever mischief his dog does. The case goes no further; nor does any other case that I can find. The law is the same in almost all cases of neglect of duty. Thus, if a drain runs from the premises of *A.* through the lands of *B.* to the sea, and it is *B.*'s duty to keep the watercourse free through his lands, yet if he omits such duty he is only answerable in damages. *A.* cannot justify coming on *B.*'s land and cleaning the drain for him. The argument is not mended by the dog having been a trespasser *ab initio;* for no one can justify shooting any trespasser, whether man, dog, or any other animal, merely *because* he or it is trespassing at the time. It is argued throughout, as if the law *required* the owner of a known vicious dog to hang it. Now all that has been decided is, that he *ought* to kill the dog; for if he do not, he will have to pay for what damage it does. Killing the dog does not recompense the sheepowner for the damage already done. The decision in *Wells* v. *Head* is fully borne out by that of *Janson* v. *Brown*, 1 Camp. 41. in 1807, which was an action of trespass for shooting the plaintiff's dog; and the defence was, that the dog was accustomed to chase the defendant's poultry; and that *just before* the dog was shot, he was worrying one of the defendant's fowls, and had not dropped it from his mouth above an instant when the piece was fired. But Lord *Ellenborough* held this to be no justification, "to which (as he said) it was necessary that when the dog was shot, he should have been in the very act of killing the fowl, and could not be prevented from effecting his purpose by any other means."

Hull. T. T.

Those of our readers who are interested in this dispute will compare the article which we first inserted (Vol. I. page 392.) with the answers here given, and in addition we extract the following reply of our first correspondent, who we trust will consider that sufficient justice has been done to his labours by inserting the essential part of his last communication.

"T. E. accurately quotes Blackstone, to the effect, that "if a man keeps a dog or other brute animal, and it do mischief, as by worrying sheep or the like, the owner must answer for the consequences, if he knew of such evil habit;" but T. E. is not accurate in his exposition of the Commentator's language, when by it he understands, "that the owner must answer at law, that is, he is liable to an action for whatever damage his dog may have committed." Suppose the dog or other brute animal killed a human being? Then, of course, the owner must answer for the consequence, if at all, not in an action, but on an indictment. However, with reference to the case in question, where the mischief was worrying sheep, the remedy was certainly by an action; but T. E. must have observed, (ante, pp. 392-3. vol. i.) that such is the law adduced by T. P., who does not indeed cite the Commentaries, but with others Cro. Car. 487., the identical case quoted by Blackstone himself.

"T. E. next quotes 1 Saund. 84., S. C. 3 Salk. 139., "that where a mastiff falls on another dog, the owner of that dog cannot justify killing the mastiff, unless there was no other mode to save his dog; as that he could not take the mastiff off:" and this law is relied upon as supporting the decision of the learned judge in *Wells* v. *Head*. But is there not obviously an immense inequality in the aggravation, and an absence of analogy between a dog's having repeatedly worried sheep, under the circumstances in *Wells* v. *Head*, and one dog's falling upon another? For aught there appears to the contrary, it might have been the *first* time the mastiff furiously fell on another dog, and nobody ever contended that for the *first* offence a dog might lawfully be shot even for having worried sheep. A mastiff's worrying another dog, by no means indicates it to be under the influence of that dangerous, fierce, and unruly propensity which the law intimates would justify its destruction. And it may be doubted whether the law would justify the killing a mastiff however frequently it worried another dog, such not being the mischief contemplated by the law when it speaks of "doing mischief by worrying *sheep or the like*." There is moreover this peculiarity to be observed — in considering the legality or otherwise of killing a *mastiff dog*, viz. the law regards a mastiff as one of the four species of dogs in which a man may have a property sufficient to maintain trover for it. Cro. Eliz. 125., Cro. Jac. 44. To kill such a dog merely to preserve a worthless cur might very possibly be deemed illegal. Is then T. E. correct when he thinks that the principle on which the case in 1 Saund. 84. was decided, would equally apply to *Wells* v. *Head*?

Now, as to the supposed illegality of the defendant's having shot the dog *after* it had worried the sheep, I would observe that, although true it is the dog had, *pro hac vice*, ceased to worry *the* sheep, had it not been shot would it have ceased to *worry sheep*? Being unrestrained

* Stra. 1264.

would it not still have been subject to the same *animus*, the same mischievous propensity, and still have had the power to worry them? This, then, I contend, is the correct view of the case, and it was the continuance of this danger towards the defendant's flock which justified his shooting the dog, without reference to the *precise moment when* it was shot."

T. P.

We presume neither party has any other object in view than the investigation of the true state of the law. Had the learned Judge been in error, it was our duty to admit a correction of it; and we are happy that other correspondents have adequately vindicated the general accuracy of the bench. Each party has had equal audience, and we trust the matter will here rest.

NOTES OF THE WEEK.

MR. RAINE.

THE profession has lately lost a very respectable member in the person of Mr. Raine. He was born in the north of England, about the year 1768, and was educated at Cambridge. He was then called to the bar, and went the Northern Circuit. His practice, however, was never very extensive.

He was made a king's counsel about the year 1810; and, according to the well known custom, was then elected a bencher of his society, Lincoln's Inn. He was auditor to the Duke of Northumberland, and was returned to parliament by that nobleman for the borough of Newport, in Cornwall, which he has represented since the year 1812. In 1816 he was appointed a Welsh judge on the North Wales circuit, and was one of the three to whom pensions were given by the late act abolishing the Welsh judicature. (1 W. 4. c. 75.) He was sixty-eight years old at the time of his death.

NEW COMMISSIONER OF BANKRUPT.

T. J. ARNOLD, Esq., Barrister at Law, has been appointed to a Commissionership of Bankrupts, in the place of Mr. Gough.

THE LAW INSTITUTION.

The Committee of Management have postponed the annual general meeting of the members from the first Tuesday in June to Tuesday the 28th of that month, in order that the interior finishings of the Hall of the Institution may be completed. This will be the first meeting of the members in their own building. The Committee will make a report of the state of the affairs and accounts of the Institution, which is expected to be very satisfactory, both as regards the increase of the members and the funds. According to the provisions of the deed of settlement, six of the present committee will go out of office by rotation, and the vacancies will be supplied, and three new auditors elected, by the members assembled. The chair will be taken at one o'clock, precisely.

SUPERIOR COURTS.

LORD CHANCELLOR'S COURT.

BREACH OF TRUST. — PARTIES.

If a breach of trust is committed by the co-assignees of an assignee, who does not interfere in the management of the bankrupt's concerns, his estate will be liable for the principal lost, but not for the interest.

THIS was an appeal from a decree of the Vice Chancellor. In 1804, Cass and two others were elected assignees of the estate of Messrs. Ogle and Walton, of Liverpool, who became bankrupts. As such assignees it was their duty to pay the proceeds of the bankrupt's estate into a Liverpool banking-house. They had, however, paid them into the house of Lumley and Co., in which Cass was a partner. This house failed in 1812, and the present bill was filed against the representatives of Cass, to recover from them the amount so deposited in the bank, with interest at 5*l.* per cent, on the ground of this breach of trust on the part of the assignees, and the Vice Chancellor had decreed accordingly.

Mr. *Solicitor General* and Mr. *Koe*, appeared for the appellants, and contended that although the estate of Cass was liable for principal, it was not liable for interest.

Mr. *Agar* and Mr. *Duckworth* appeared for the respondents.

The *Lord Chancellor* said that it appeared by the evidence that although Cass was a partner, he was only a nominal partner, and there was no proof that he had taken an active part in the proceedings of the house of Lumley and Co. He did not seem knowingly to have departed from his duty as trustee, and he thought that under all the circumstances, although his estate was liable for the principal, it was not liable for interest. He therefore allowed the appeal, but reserved the question of costs. — *Tobin* v. *Cass.* May 2. 1831.

WRIT DE CONTUMACE CAPIENDO.— PRACTICE.*

A peer cannot be arrested by virtue of the process of the Ecclesiastical Courts.

Mr. *Campbell*, (with whom was Mr. *Follett*,) appeared to oppose the issuing of the writ *de contumace capiendo* against Lord Westmeath, for nonpayment of the costs awarded against him by the Court of Delegates. He took several

* See 1 L. O. 412., where the former hearing is given.

objections:—first, that the Court of Delegates had no power to award costs; secondly, that the delegates, having pronounced a definitive sentence before they issued the monition for costs, were *functi officio;* thirdly, that at the time of taxation, and when the monition was awarded, there was no common law judge present, as under the terms of the commission there ought to have been; and fourthly, that the *significavit* from the Ecclesiastical Court having been granted in the life of the late king, had abated, and that the writ having been once made out upon that *significavit*, its force was now spent. Each of these points was argued at length, and relied upon a recent decision in the case of General Blake, where the Court of King's Bench had decided that a monition granted by the condelegates only, in the absence of a common law judge, was invalid. This last point was, however, given up, on an intimation from the Lord Chancellor that there was nothing in it. The principal point, however, on which he relied was, that the privileges to which Lord Westmeath's rank entitled him protected his person from all civil process, and that this process upon the writ *de contumace capiendo* was nothing but civil process.

Dr. *Lushington*, (with whom was Mr. *Bacon*,) on the other side, was about to argue the question as to the power of the Court of Delegates to award costs, but the *Lord Chancellor* said he should not trouble him upon that, being satisfied of their power.

The learned counsel then went on to argue, that although the sentence could not have been pronounced in the absence of the common law judges, yet as the awarding costs was only a consequence of that sentence, the condelegates were authorised to finish that which had been begun by the whole body, and that their duties could not be said to have terminated until the case before them was fully disposed of; and that the monition was awarded on the same day that the sentence was pronounced. As to the authority in General Blake's case, the circumstances were wholly different, and the decision did not apply. The practice of the ecclesiastical courts had always been to follow the course which had been adopted in this case, and it would be useless and inconvenient to require the presence of common law judges. The chief point, however, was as to Lord Westmeath's privilege, which he contended did not apply here. The process of excommunication might have been issued under the old law. The act of parliament which abrogated that law had substituted the writ *de contumace capiendo*, and as there was no special exemption in the act for peers, they were equally liable as they would have been if the act had not passed. If it were otherwise, there would be a gross failure of justice, and all peers and peeresses in their own right, and all members of the House of Commons, might set at defiance the process of the ecclesiastical courts in all cases; for if parties had not this remedy against them, they were wholly remediless. And this evil would arise not only in cases respecting marriage, but in the cases of wills; it would be impossible to compel a person so privileged to produce or prove a will, or to do any other thing which the course of justice required to be done.

The *Lord Chancellor*, without calling for a reply, said he was glad that he was able to decide this case without referring to the authority of General Blake's case, which had been cited, because he had great respect for the court in which that case had been decided, and no less respect for the ecclesiastical courts, in which a practice had for centuries prevailed which was opposed to the authority of the courts of common law. He should go therefore at once to that which put an end to all controversy upon the minor points of the case,—the question of privilege. From the first moment at which he had begun to consider this case, it appeared to him that nothing could be more anomalous than to say that civil process (and whatever shape this might assume, it was merely civil process,) could take effect against persons protected by privilege of parliament. Why, then, should any exception be made in favour of such process issuing from any ecclesiastical court, which did not prevail respecting any other court? The nonpayment of the costs which had been awarded by the Court of Delegates was no more criminal in itself than the nonperformance of an award in a court of law, or the not putting in an answer, or not performing the order of a court of equity. The process began in a civil right, and it continued and ended in applying a civil remedy. The party was said to be in contempt; but since the privilege of parliament protected in one case, why should it not in another? Then all that remained to be considered was the fact, that if this personal remedy could not be applied, there was no other that could be afforded. In this court, although a peer's person was privileged, the ends of justice might be attained by means of distress infinite; but in the case of process from the ecclesiastical courts no such relief could be had. The argument to be drawn from this would, if the law upon the subject were doubtful, weigh very much on his Lordship's mind in favour of granting the writ; but he could find no room for any such doubt. Under these circumstances, then, such an argument did not belong to a court of law. It was for the legislature to supply that which, by the act of the 53 Geo. 3. c. 15 was left open and defective. In his opinion it was a *casus omissus*. The rule his Lordship took to be this—not drawing the line upon theoretical notions of the *Lex Parliamentaria*, which had been said by Lord Coke to be a subject of such mystery and profundity, that it was *omnibus desiderata, paucis cognita*,—not resting it upon the grounds of those notions of privilege and prerogative which had been in former times insisted, for the purpose of defeating the rights of mankind and setting justice at defiance,—nor upon the technical grounds that all which was not either felony, or treason, or breach of the peace, was entitled to privilege (for there had been many cases which were neither of these, in which privilege of parliament had been held to be no protection)—but he took the plain, broad, intelligible distinction to consist in this—that respecting every thing that was in its nature criminal, privilege of parliament would not enure to protect; but that respecting every thing which was in its nature civil process, whatever might be its outward or technical form,

such privilege should be a protection. On the one side he placed the process of the courts of law and equity, and on the same side he placed that emanating from the ecclesiastical courts. He was therefore of opinion that Lord Westmeath being entitled to all such privilege as peers of parliament enjoyed, could not be amenable to the process prayed in this case, and that therefore the writ should not issue.—*Westmeath* v. *Westmeath*. May, 5. 1831.

ROLLS COURT.

VENDOR AND PURCHASER.—SPECIFIC PERFORMANCE.

What indemnity a purchaser may be compelled to execute.

This was a bill filed to compel a specific performance under the following circumstances:—In 1810, the plaintiff being entitled to the impropriate tithes of Laugharne, in Carmarthenshire, contracted with the defendant for the sale of a large portion of them, with the proviso that the defendant should be indemnified by the purchaser of the remainder of the tithes against all claims on him for the stipend payable to the vicar of the parish, and other expenses connected with the contract. Until this indemnity should have been procured, it was also agreed that 2000*l* of the purchase-money should remain in defendant's hands. The plaintiff entered into another contract with a person of the name of Price Watkins for the sale of that portion of the tithes which remained undisposed of, this purchaser covenanting to supply the indemnity above referred to. The bill now prayed that Watkins might be compelled to execute this indemnity, and that Lord Kensington should accept it when offered.

Mr. *Rogers*, who appeared for the defendant, objected to the bill for informality and want of parties; inasmuch as it had not called upon the defendant to pay the 2000*l*. which remained in his hands of the purchase-money; and because a person who had been a trustee for the defendant had not been made a party to the suit.

His *Honour* remarked, that although the objection was valid it was inexpedient; and a decree was taken by arrangement, supplying the omissions, and securing the substantial objects of the bill.—*Cotterel* v. Lord *Kensington*. May 5. 1831.

COURT OF KING'S BENCH.

(*Before the Four Judges.*)

COSTS AT JUDGES' CHAMBERS.

A Judge cannot grant costs at chambers.

On showing cause against a rule *nisi* for discharging an order of Mr. Justice *Taunton*, dismissing a summons "with costs," on the ground that a Judge at chambers has no power to grant costs; it was contended, that a Judge at chambers must be taken as possessing the same power as the Court itself, although sitting apart from it, and therefore that he had power to grant costs. It was admitted that no reported case could be found, in which a Judge had that power at chambers.

All the four Judges present observed that it was contrary to their practice to allow costs at chambers; and, as far as they were aware, contrary to the practice of the other Judges.

Lord *Tenterden* C. J. I am of opinion, that this rule for discharging the order must be made absolute. It is true that, perhaps, if we were to examine very minutely into the matter, it might be found that a Judge has power to grant costs on summonses; but that is a power which has never been exercised, and the practice has been not to do so; and we therefore must be bound by that practice. If we were not to do so, we should discourage a very useful mode of proceeding, viz. by summons. That is a mode much more economical than by application to the Court. By exercising a power to give costs at chambers, we should prevent parties from having recourse to the less expensive method.

Littledale J., *J. Parke* J., and *Patteson* J., concurred.

Rule absolute. *Anonymous*. E. T. May 7, 1831.

This decision, we hope, will be in some degree useful, if not satisfactory, to our correspondent "J. J. R.," whose letter we inserted at p. 238. of our first volume.

CONSTRUCTION OF WILL.

The words, "Every thing I now possess, or shall be possessed of at the time of my death, whatsoever and wheresoever," in a will, pass the fee in lands of which the testator dies seised.

On a case stated for the opinion of the Court in the above cause, the question raised was, whether the fee in certain copyhold estates passed under the will of the testator to his wife. He devised various personal and leasehold property to her in the first two clauses of his will; and in the third, in devising other property to her, he used these words: "Every thing I now possess, or shall be possessed of at the time of my death, whatsoever and wheresoever." The question as to the fee passing arose on these words.

Capron for the plaintiff, *Platt* for the defendant.

Lord *Tenterden* C. J.—I am of opinion that the fee passed by these words. It is clear that the testator intended to dispose of his whole estate; but if this passage in the will were not to receive the construction which I think it ought, the intention of the testator as to some portion of his property would not be effectuated. Besides, he uses the word "wheresoever," which is a word of locality, and therefore must be considered as intended by him to be used for the purpose of devising his landed estate.

Littledale J., *Parke* J., and *Patteson* J. concurred.

Taunton J. was in the *Nisi Prius* Court.

Doe dem. *Burgess* v. *Carter*.—E. T. April 29. 1831.

PROMISSORY NOTE — DRAWER'S LIABILITY.

The drawer of a promissory note given as a security for a debt, is liable, although the creditor has entered into a composition deed with the debtor, without notice to or knowledge of the drawer, nothing having been paid under the composition deed.

This was an action against the drawer of a bill of exchange. The cause was tried before Lord *Tenterden* C. J. at the sittings after last Hilary term, and a verdict found for the plaintiff, with leave to the defendant to move to enter a nonsuit. The facts were the following:—Johnson, the son-in-law of the defendant, being about to commence business as a coal-merchant, applied to the plaintiffs to supply him with coals on a certain credit. This they were willing to do, provided the defendant would give them collateral security. He accordingly drew a promissory note for 50*l.*, endorsed it, and it was deposited with the plaintiffs. The defendant received a bill of sale from Johnson for his own security. The dealings between the plaintiffs and Johnson continued for two years. The circumstances of Johnson then becoming embarrassed, the plaintiffs persuaded him to enter into a composition deed, and securing the amount of the composition by bills of exchange, with a proviso, that if any of the bills were not paid, the plaintiffs should have recourse to the collateral security. No notice whatever of this deed was given to the defendant. At the suggestion of a clerk to the plaintiffs' then attorneys, Johnson afterwards became bankrupt.

Campbell (with whom was *'Espinasse*) moved to enter a nonsuit, on the ground that the defendant was discharged, on account of the plaintiff having entered into an arrangement with Johnson, without notice to or knowledge of Norris, particularly now that he was prevented from having recourse to his bill of sale.

Per Curiam. We cannot distinguish this case, in principle, from that of *Fentum* v. *Pocock*.* The rule must therefore be discharged.

Rule discharged. — *Nichols and another* v. *Norris.* — E. T. April 20. 1831.

ATTORNEY'S ADMISSION.

An attorney practising after the expiration of his certificate, before re-admission, although at the time having taken out another certificate, must pay the arrears of duty for the time elapsing since the former certificate expired, and a nominal fine.

Richards applied, on the part of an attorney, to be re-admitted. He had regularly taken out his certificate, and then, from peculiar circumstances, became unable to take it out for two years. Without being re-admitted, he then took out his certificate, and had continued to practise till the present time. During the two years in which he did not take out his certificate, he ceased to practise altogether. He had therefore never practised without a certificate, although he had practised without re-admission.

Taunton J. If an attorney ceases to take out his certificate "for the space of one whole year," he is off the roll. † If, therefore, he practises then, he is liable to penalties. ‡ The practice in such cases is to make him pay arrears of duty accruing since the expiration of the last certificate, and a fine. This gentleman, therefore, may be re-admitted on paying the arrears of duty for those two years when he did not practise, and paying a nominal fine of twenty shillings.—*Anonymous.* E. T. May 5. 1831.

COGNOVIT. — PRACTICE.

The Court [qu. under the circumstances of the case,] will not set aside a cognovit executed before the return of the writ.

We have been favoured with the brief in the case of *Charlwood* v. *Manley*, which was an application to set aside a *cognovit*, and we lay before our readers the substance of the affidavits on both sides. It will be observed, that the Court refused to set aside the proceedings; but we are not informed whether it was expressly determined that it is regular to sign judgment on a cognovit given before declaration, or whether the decision turned on the special circumstances of the case. It being clear, however, that the Courts of Common Pleas and Exchequer of Pleas concur in the propriety of the practice, there seems little doubt that the Court of King's Bench will pursue the same course, unless the difference between the nature of a bill of Middlesex or precept, and the *capias* and *quo minus* in the other Courts, creates an essential distinction.

We inserted, from the notes of our reporter, a short statement of a case on this subject, and presume, though the particular circumstances here detailed were not stated, that it must be the same case as the present.

On applying for a rule *nisi* to set aside the judgment and restore the levy, it was stated, that the action was commenced by bill of Middlesex on the 21st March, 1827, returnable the first return of Easter; *cognovit* of the same date, common bail filed by the plaintiff's attorney for the defendant, and judgment signed 1st December, 1828, and the declaration was entitled of Michaelmas term 1828, though the process was returnable in Easter 1827.

On showing cause, the following facts were deposed to by the plaintiff's attorney:—

The debt arose on a bill for 10*l.* 10*s.*, due 13th March, 1827. An application was made for payment, and the defendant called on the plaintiff's attorney, and requested time, which was given him, on his agreeing to sign a *cognovit*. A writ was then issued to ground the *cognovit*, and the defendant signed the *cognovit*. The plaintiff's attorney charged only one guinea for his costs. It was then stated that the defendant absconded, and judgment was not signed till 1st December, 1828, when it was expected to meet

* 5 Taunton, 192. In that case it was decided, that if the holder of a bill of exchange, accepted for the accommodation of the drawer, takes a *cognovit* from the drawer for payment by instalments, he does not thereby discharge the acceptor, whether the holder, at the time of taking the bill, knew it was an accommodation bill or not.

† 37 Geo. 3. c. 90. § 31. ‡ § 30.

with him; but he avoided the process till September 2. 1830, when the plaintiff's attorney met him in the street, and by following him several hours, ascertained his address, and he was taken. The defendant applied, by summons, before a Judge at chambers, for his discharge, but failed in the application, and then paid the debt and costs.

Under the circumstances, after hearing Mr. *Comyn* for the plaintiff, and Mr. *Curwood* for the defendant, the *Court* discharged the rule, with costs.— *Charlwood* v. *Manley*, M. T. 1830.

MINOR CORRESPONDENCE.

ANSWERS TO QUERIES.

PROBATE DUTY.

In reply to the first part of the query of E. F., it may be useful to him and others to be informed of the following particulars. *G. K.* bequeathed a sum of stock, in trust, to pay the dividends to *C. H.*, and after her decease, upon trust, to transfer the principal sum to such person and persons, in such shares, &c. as she (*C. H.*) should by *deed*, or *will*, appoint; and in default of appointment, the testator directed that the principal sum might fall into the residue of his estate.

C. H. died, having by her will exercised her power of appointment in favour of *A. B.*, and appointed him executor and residuary legatee.

In this case, *C. H.* had scarcely any property besides the sum which she enjoyed under the will of *G. K.*, and over this she had an absolute control by deed as well as by will. Yet, nevertheless, inasmuch as this control was to be exercised by way of appointment only, it was conceived that the property could not be part of *C. H.*'s estate and effects. Mr. Gwynne was accordingly consulted; and it appeared that until lately, whenever a party had an absolute power of appointment, as in this case, and exercised it by will, it was conceived by the officers at the Stamp Office that he made the property appointed, a part of his estate, and liable to his debts; and that, therefore, it was liable to, and it had always been the practice to charge it with, probate duty; but that, in consequence of the propriety of the practice having been lately questioned, the opinions of the Attorney and Solicitor General (Scarlett and Sugden) had been taken, and they being of opinion that property so appointed was not liable to probate duty, the Legacy Office had ceased to require it to be paid.

Under these circumstances, *A. B.*, on taking probate, swore the effects of *C. H.* to be under 100*l.*, thus excluding the sum appointed.

Then arose the last question of E. F., viz. What rate of legacy duty was to be paid by the appointee? *C. H.* had, in her lifetime, paid a duty of 10 per cent. upon the value of her life interest (being a stranger); and the executors of *G. K.*, as directed by the 18th section of 36 Geo. 3. c. 52., which runs as follows:—"Where any property shall be given for a limited interest, and an absolute power of appointment shall also be given to any person who would not be entitled in default of appointment, such property, in the execution of such power, shall be charged with the same duty as if the same property had been immediately given to the person executing the power, after allowing any duty before paid in respect thereof;"— before they, in pursuance of *C. H.*'s appointment, transferred the fund to *A. B.*, who was also a stranger to *G. K.*, paid so much money at the Legacy Office as, with that paid by *C. H.*, made up 10 per cent. upon the principal sum left by *G. K.*

A statement of the facts was then laid before Mr. (now Justice) Patteson, with instructions to advise whether *A. B.* was liable to pay any legacy duty on the sum appointed by *C. H.*, as appointee under her will, beyond that which had been already paid under the will of *G. K.* by *C. H.* and the executors of *G. K.*: and if liable to pay any legacy duty, after what rate?

The following is a copy of Mr. Patteson's opinion:—"If *C. H.* had executed by deed the power given to her, *A. B.* would only have been liable to make up the 10 per cent. after reckoning what had been paid by *C. H.*; but as she executed by will the power given to her, I think that the case is within 45 Geo. 3. c. 28. § 4., and that *A. B.* must pay the duty under the will of *C. H.*; and I have no doubt that such duty is 10 per cent. John Patteson. Temple, Oct. 23. 1830."

J. C.

ARREST.

In answer to the query in No. 30. Vol. ii. page 47. of the Legal Observer, I am of opinion that *B. cannot* legally cause *A.* to be arrested. If there have been mutual dealings between the parties, the defendant should be holden to bail for the balance only. 4 Burr. 1996. Yet where the defendant had refused to furnish any account, the Court of Common Pleas held, that the plaintiff was justified in holding the defendant to bail for the full amount of the goods sold to him. 5 Taunt. 259. And in the case of *Dronefield* v. *Archer*, 5 B. & Ad. 513. and 1 D. & R. 67., the court in precisely a similar case to the one supposed, held, that it could not be contended that a plaintiff was at liberty to arrest a party, and hold him to bail for the whole sum on his side of an account; and added, that the effect of the statute of set-off is to make the balance really due, the debt for which the arrest ought to be made. C.

If *B.* arrested *A.* under the circumstances stated, it would be a very illegal proceeding, and without doubt come under the term of a malicious arrest. See 1 Tidd, 174. ed. 9., as to arrest where there have been *mutual dealings*.

F. G.

AGENT — LOSS BY FIRE.

I should think *B.* would not be liable to *A.* for the loss sustained by him, unless it could be shown the fire was occasioned through the negligence of *B.* Sir William Jones, in his Law of Bailments, says, "No bailee shall be charged for a loss by inevitable accident, or irresistible force, except by special agreement." A. F. C.

QUERIES.

FEES OF THE HOUSE OF LORDS.

In consequence of a late regulation of the House of Lords, the door-keepers, in addition to the long established bar fee of 3*l.* 10*s.*, claim five guineas, as well from appellants as respondents, and plaintiffs and defendants in error. This is now demanded as a matter of right; whereas, until within the last two or three years, it was asked merely as a gratuity, and the sum usually paid was four guineas by each party. Can this fee be legally insisted on, either against the agent or the client? Surely such a body as the House of Lords should pay their own officers, whose only services to the parties are handing chairs to the four counsel, and laying before them two or three sheets of paper.

A. S.

POWER OF APPOINTMENT — VESTED INTEREST.

Under a marriage settlement, certain personal property is given to trustees, in trust, to pay the interest and annual produce to the wife for life; and afterwards, in trust, to pay the interest to the husband during his life; and after his decease, in trust, for the benefit of the child or children of the marriage who should attain the age of twenty-one. The settlement also contains a power enabling the wife, in case there shall be no children of the marriage who shall attain the age of twenty-one, to dispose of such property as she by her will might direct or appoint; and in default of such direction or appointment, then to be held, upon trust, for the benefit of such persons as would, under the statute for the distribution of intestates' effects, be entitled to the same. The wife, in the exercise of the power, made a will, bequeathing the property over which she had a disposing power to her husband, provided there was no child or children of the marriage. The wife afterwards died, leaving an infant daughter. There having been a child, as contemplated by the settlement, is such will capable of taking effect, in the event of the child dying before twenty-one, so as to entitle the father to the property; or will the property be divisible, as in cases of intestacy?

H. C.

MISNOMER.

B., who has three Christian names, is indebted to *C.*; *C.* only knows *B.*'s first Christian name and surname, and the initial letters of *B.*'s two other Christian names. Can *C.* safely sue *B.* by his first Christian name and surname only, omitting *B.*'s two other Christian names; or can *B.* plead the omission of his two Christian names in abatement?

It may be added to the question (which arises from a real case), that *B.* has left this country to reside abroad for some years; and it is presumed if *C.* enter a bill of Middlesex on the roll, to save the Statute of Limitations, omitting any of *B.*'s names, that *B.* may on his return be able to defeat *C.*'s action, and bring the debt again within the statute by pleading the misnomer (if any) in abatement.

T. W.

NUISANCE.

A. has just erected new dye-houses on the site of *very ancient* ones, which had not been worked for eight years; *B.* occupies, and is the owner of a less ancient dwelling-house, situate about 400 yards from the dye-houses, and he has by a notice threatened *A.* that unless he discontinues his dyeing, *B.* will commence an action on the case to recover damages for the nuisance. Can *B.* sustain this action?

U. V.

FORGING UNSTAMPED RECEIPTS.

A person employed by a public company, as manager, forges receipts for the payment of goods pretended to have been bought by him on behalf of the company from different tradesmen, which he produces as vouchers: such receipts are on unstamped paper. Can he be indicted for forgery?

Manchester.

RESIDUARY ESTATE.

Stock is bequeathed to a person; the testator dies a day or two before the dividends are due. Do the dividends follow the stock, or form part of the residue of the estate, no mention being made of them?

E. P.

BANKERS' LIABILITY.— FORGED INDORSEMENT.

A bill is drawn by *A.* upon his correspondent *B.*, in favour of *C.* or his order, with whose handwriting both *A.* and *B.* are acquainted. *C.* indorses the bill to the order of *D.*, and it is then presented, without any further indorsement, to *B.* for acceptance. He makes it payable at his banker's, and the indorsement of *D.* is subsequently forged. The bill is then presented to the bankers, and they pay it. Upon whom does the loss fall?

J. C.

MISCELLANEA.

STATE OF THE LAW IN THE TIME OF HENRY VII.

Henry VII. bestowed great personal attention to the state of the laws during his reign. In every instance where their reformation did not interfere with his own prerogatives or interests, this monarch was willing enough that they should be amended. Lord Bacon justly celebrates Henry VII. for the many excellent laws he made, and for the care which he bestowed on their regular execution afterwards. In the first year of his reign, this monarch, at the close of parliament, devised an oath, binding all persons who took it, to observe the execution of several statutes. We are told, that not only those of the household, but those of the House of Commons, came before the king and lords, and took this oath. After these the peers, both spiritual and temporal, were asked by the Chancellor whether they were willing to take the oath; who all answering that they were ready, it was read to them; and every lord spiritual laying his right hand on his breast, and every temporal lord on the book of gospels, sware to observ

and perform the same. The substance of the oath was, not to harbour felons; not to retain any one, by indenture or oath, contrary to the statute of liveries; not to encourage maintenance, nor embracery, nor riots, nor unlawful assemblies; not to prevent the execution of the king's writs; nor let to bail or mainprize any felons. A precaution this, which shows at once the king's solicitude for the due execution of justice, and the protection it needed in times when great men, instead of promoting, had been more used to defeat the effects of it by force and cabal. Indeed, notwithstanding all the monarch's precautions, the magnates of the land still endeavoured to act in their despite. Being entertained at the Earl of Oxford's with great state, Henry VII., at his departure, had reason to express his astonishment at the number of servants in liveries and badges he saw waiting; but being informed by his host they were his retainers come to do him honour, he told him he would not have his laws broke before his face, and that his attorney must speak with him. It is said the earl paid 15,000 marks as a composition for this offence. This, perhaps, was a righteous measure of justice; but it cannot be denied, that, notwithstanding the bad use sometimes made of severe laws, the temper of Henry VII. contributed to establish the laws in their full force, and to render the administration of justice more regular and effectual. While this had a good influence on the order and peace of society, it levelled all ranks of men under the same submission to lawful authority. The executive magistrate, in the person of Henry VII., increased in power and distinction; while the nobility sunk below the relative importance they had formerly enjoyed; which, although the commons continued still in their original imbecility, and the crown availed itself of the opportunity to aggrandise its prerogative to a degree much exceeding what it had been in earlier times, was, in that respect, a benefit incalculably advantageous to the progress of society.

The march of improvement was also visible in other legal circumstances, particularly in regard to the statutes, judicial records, and reports, which are the legal monuments of this reign. The statutes underwent no further alteration in the manner of forming them in parliament. The records are, from this period, almost in a regular series, kept with order and in good preservation, as may be seen in the repositories of the Courts of King's Bench and Common Pleas, in Westminster Hall. The reports are the *year-book*, with some cases in the collectors *Jenkins* and *Bendoe;* but more particularly in *Keilwey*, who lived at this time, and took them himself. The year-book of this reign, as it goes more into points of law, and such matters of learning as have survived the times when they were debated, is deserving more attention than the preceding. We find the counsel and judges sometimes quoting cases; and Bracton is once or twice referred to: though this was not common; their determination being mostly the result of argument and discussion, of which have been made precedents for future ages.

LAW, A SCIENCE.

It is rather to law as a science that the young legal student should direct his attention, and proceed in the study of it on a large and liberal scale. He should compare the laws of his country with those of ancient times and of other lands; and he will find, as was experienced by Sir William Jones, that there is no branch of learning from which a student of the law may receive a more rational pleasure, or which seems more likely to prevent his being disgusted with the dry elements of a very complicated science, than the history of the rules and ordinances by which nations eminent for wisdom and illustrious in arts have regulated their civil polity. Nor is this the only fruit he may expect to reap from a general knowledge of foreign laws both ancient and modern; for while he indulges the liberal curiosity of a scholar, in examining the customs and institutions of men whose works have yielded to him the highest delight, and whose actions have raised his admiration, he will feel the satisfaction of a patriot, in observing the preference due, in most instances, to the laws of his country above those of all other states; or, if his just prospects in life give him hopes of becoming a legislator, he may collect many useful hints for the improvement even of that fabric which his ancestors have erected with infinite exertions of virtue and genius, but which, like all human systems, will ever advance nearer to perfection, and ever fall short of it. This mode of studying the laws of his country the young lawyer will find of great advantage to him when he comes to practise at the bar. It will enable him to conduct his argument by the light of a principle, which, as *Erskine* experienced, will be found exceedingly influential with a jury. To conduct an argument in this way requires great genius in the advocate, and would seem to require correspondent intelligence in the jury. But the fact is, that these principles are parts of the moral nature of every man, though it is not every man who can express them either in conduct or language; yet, when once expressed by a cultivated and commanding intellect, they, in the mind also of the hearer or spectator, awaken to animation, and start into life, as at the touch of the Ithuriel spear of genius. So,

> "When a spark
> Lights on a heap of nitrous powder, laid
> Fit for the tun, some magazine to store
> Against a rumour'd war, the smutty grain
> With sudden blaze diffused, inflames the air."

This effect of oratory constructed upon principles, is also partly owing to the tendency which it always has to produce a lucid arrangement of the materials of argument, with a just government over its different parts, and a clear and gradual elucidation of the whole case; giving the entire proceeding at the same time an air of truth and honesty, which elevates the hired advocate into the appearance of an apostle of justice, pleading for the abstract and incontrovertible rights of men, and the uncorrupted and unimpeachable execution of the laws.

The Legal Observer.

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> ——— "Quod magis ad nos
> Pertinet, et nescire malum est, agitamus."
>
> HORAT.

THE COURT OF KING'S BENCH AND ITS JUDGES.

LETTERS OF A HEIDELBURG STUDENT ON THE JURIDICAL INSTITUTIONS OF GREAT BRITAIN.

LETTER III.

MY DEAREST FRIEND,

I SHALL now proceed to give you some account of the courts which are known under the general term of "The Common Law Courts." These are the Court of King's Bench, the Court of Common Pleas, and the Court of Exchequer. Each of these courts had, at one time, a separate jurisdiction; but at present there is very little difference between them. The judges who preside over them are always chosen for their eminence in the knowledge of the laws. They are not, as with us, mere political appointments, but are selected from the bar purely on account of their qualifications for the bench.

It is true, that sometimes a bad appointment is made, but it is highly creditable to this great country that the majority of the judges have been elevated on account of their supposed qualifications for office. Here and there a minister or a chancellor will promote a friend;—this even is never a gross appointment; but, for the last hundred years, at least, the judges of England have been selected without any reference to their political sentiments or general qualifications, but simply from their superior knowledge of the laws of the land, and their fitness for the office.

This glorious election, in my opinion, has done more to preserve England from the worst of evils, than any other of her blessings. Even-handed justice has been administered to her citizens. The judicial character has remained pure and unstained. And it is thus, also, that the high character of the bar has been preserved, as from its members the future judges of the land are to be selected.

What a different scene dost thou present, my fatherland! Thou knowest, my dear fellow-student, the tools who are elevated to the bench in Germany. The proud, ignorant, and bigoted son of the noble; the instrument of the state intrigues, or the loose pleasures of the minister; the statesman whose political prospects are blighted; these are the persons who preside on our judgment seats, and trifle profanely with the sacred duties of justice. When have our judges been selected from the bar for their superior deserts? our bar, which sinks beneath the look of a soldier, and, to the stoutest of whose hearts the clang and rattle of a dragoon can send the basest fear. These are thy judges and thy bar, my fatherland! How different, alas, from those whom I am about to describe.

Let me, however, not waste your time in vain regrets, but proceed at once to the subject of the present letter.

I shall commence with the King's Bench, as the first in dignity and jurisdiction. The first peculiarity of this court which attracted my notice was, that four judges preside here instead of one, as in the Courts of Equity. There are now, in fact, five judges, as, by a late act, the king was empowered to appoint an additional judge to each of the three common law courts. Four of these judges sit in one court in term time, to hear and decide important points of law, either arising out of the preceding circuits (of which I shall shortly give you a description), or brought before them in an original form. The fifth judge sits apart from the rest for the despatch of matters of practice, and the minor business of the court. He also sits for the trial of causes within the term. The same rule, I understand, is also adopted in the other two courts.

The presiding judge in this court is Lord Tenterden. In him is seen an extraordinary fitness for his exalted station. He is gifted at once with quickness and judgment, facility of perception, and sagacity. Elevated entirely by his own

exertion to the rank which he holds, we see united in him a most extensive knowledge of the law, and a clear comprehension of the facts of every case which comes before him. He was comparatively early in life singled out as a man worthy of being elevated to the bench, and was made a *puisne* judge before he obtained the rank of King's Counsel. His talents in this capacity were so conspicuous, that he was soon after appointed Chief Justice of England. His decisions have given great satisfaction to the profession. Exceedingly few of his determinations at *nisi prius* have been over-ruled. His acquaintance with mercantile law, real property law, and criminal law, is regarded as more extensive than that of any other judge on the bench. In proof of his popularity as a judge in the trial of causes, I am informed, that the mere fact of his going a particular circuit is quite sufficient to cause an increase of business on that circuit. Not that he is a cause of increased litigation, but the parties, if it be at all possible, are more anxious for his opinion than for that of any other judge. It is, indeed, said by the bar, that his temper is somewhat quick, and, from that cause, he frequently gives offence. But that quickness, I am assured, arises rather from the infirm state of his health, from which he has long suffered, than from any other cause. When not labouring under indisposition, no judge can be more kind in his manner. And, indeed, there must be occasions in which it is necessary that he should be ready in the exertion of authority when the pressure of public business requires despatch. A promptness in repressing irregularity of all kinds, into which the bar will frequently fall, is absolutely necessary in the first common law judge; and it would otherwise be nearly impossible for him to get through the great amount of business which is cast upon him.

The senior *puisne* in the court, namely, Mr. Justice Littledale, is by no means so deserving of admiration as the Chief Justice. His fame, when at the bar, had been chiefly confined to an intimate knowledge of pleading and practice. Since he has been raised to the bench, he has not done much to entitle him to any higher rank. He had been remarked, while at the bar, for indecision in his opinions, and that unfortunate defect still continues. He is not happy in his manner of giving judgment; he generally begins by finding out some pleading crotchet, which shows that his judgment ought to be one way. He then states, that the law and the justice of the case are quite the other way. Then, without stating why he over-ruled the point of pleading, or the law and justice of the case, he will decide in favour of the one or the other, apparently without any very distinct reason. He is remarkably absent. He will frequently sit for many minutes apparently unconscious of all that surrounds him. It is only just, however, to say, that he is a remarkably kind-hearted man, and frequently delivers an able and elaborate judgment on points peculiarly relating to his former studies.

Mr. Justice James Parke has been also the object of my enquiries. I find that he has been a judge for only two years, but that his talents have amply justified the appointment. Before his promotion, he was regarded as an excellent lawyer and pleader. Since his promotion, he appears to have acquired the judicial manner by intuition. He decides as readily, succinctly, and correctly, as if he had been for many years on the bench. It has, however, been said, that he occasionally forms his opinions too soon, and retains them too pertinaciously.

Mr. Justice Patteson is one of the new appointments under the late act. He has only been appointed a few months. Of his deserts as a judge, therefore, I can say nothing; but of what he will deserve I could say much. He is an excellent lawyer, and well acquainted with the practice of the court. His manner is kind and amiable, and calculated to make him beloved by the profession; and, as far as can be judged from his labours on circuit, he will make an admirable judge.

Of Mr. Justice Taunton, another of the new appointments, it must be admitted that he has a good knowledge of law and pleading. His knowledge of practice is, however, very confined; and that, perhaps, arises from his having had very little court business while at the bar. He is not quick in catching a point. But this want of quickness, I think, does not arise from insufficiency of intellect, but more than sufficiency of ill temper. He seems always to be in ill humour. Every thing, therefore, he hears, is calculated to excite his spleen. That spleen he vents upon any person, whether barrister, attorney, or officer of the court, who may happen to address him. It is to no purpose that the object of his wrath humbles himself; the judge becomes the more exalted. It is to be hoped, that sooner or later some kind friend will point out to him this peculiarity, and then nothing will interfere with the respect which all will then owe and are ready to pay him.

Thus, my friend, you have now before you the judges of the first common law

court of this country. I shall soon be able to make you as well acquainted with those who preside in the other courts.

Ever your most faithful friend,

* * * *

PRACTICAL POINTS. No. III.

LIMITED LETTERS OF ADMINISTRATION.

When a will has been proved in an inferior jurisdiction where the deceased died, the Prerogative Court will grant a limited administration to assign a satisfied term situate in another diocese, but will not enforce a monition to transmit the original will.

Sir *John Nicholl* has lately delivered a luminous judgment on this point. "The question," he says, "assumes a very awkward shape, from the appearance in this case not being given by the party, but by the Judge of another jurisdiction asserting his own right in opposition to the right of this Court: it is awkward for this Court to have to decide on its own jurisdiction; but as this is cast upon it, the Court must endeavour to discharge the duty. I need not observe that jurisdictions are not given for the benefit of those who exercise them, but to the public who have occasion to resort to them. The emoluments of the Judges and registrars, and others connected with them, are a very secondary consideration; the primary consideration is the administration of justice to the public. The metropolitan has, under certain circumstances, the right to grant a prerogative probate for this purpose,—that where the property lies in different jurisdictions, parties interested may be saved the expense and inconvenience of resorting to more authorities than one. Now, (except under very special circumstances,) all jurisdictions are limited in their authority to property locally situate within their limits. The archbishop to his province—the bishop to his diocese—the archdeacon to his archdeaconry. Here the property is not locally situate within the archdeaconry of *Sudbury* the jurisdiction where the party died, but in another jurisdiction and diocese. There is an absolute necessity that acts should be done in respect to this property, in which the rights of the parties are interested, and which acts can only be done by the legal representative of the deceased *quoad* this property; it is quite clear that the archdeacon of *Sudbury* cannot grant a representation sufficient for this purpose, because the property (whatever be its value, or if of no value) is not locally situate within its jurisdiction. It seems equally clear also to me, that the ordinary of the place where the property is locally situate cannot grant a representation, because the deceased has left other property above *5l.* in value in another jurisdiction, *Sudbury*. What then is to be done? Are the rights of the parties to be lost? and is no legal title to be made to this property? That cannot be. What other jurisdiction but the archbishop has authority to supply this deficiency? The representation being necessary, and no other jurisdiction competent to grant it, I think, *ex necessitate*, that this Court, without enquiry as to the value, has not only jurisdiction, but is bound to exercise it: the grant, however, must be limited, and strictly limited to the purposes prayed. The next question then is, as to the mode of making the grant; and whether any, and what, arrangement can be made in that respect? It is said that the property is of no value; but the legal property was in the deceased, and his act, if living, would be necessary to make a title: and though, as a trustee, a Court of equity would compel him to do such act, yet in law he is the proprietor. Still, I should be sorry to hold, that those naked trusts, in all cases, make *bona notabilia*, which would make the grants of other jurisdictions null and void; and it might be an inconvenience to the parties beneficially interested in the property, to be obliged to take a prerogative probate, when a local jurisdiction might otherwise be competent: yet I suppose no conveyancer would be satisfied with a conveyance of property situate in one jurisdiction, under an administration granted by the authority of another jurisdiction; for, manifestly, it would not be any conveyance, because the archdeacon of *Sudbury* could not make any person legal representative *quoad hoc*—to make a valid title to premises in another jurisdiction. However, as an administration limited to this particular purpose is only prayed, not a general administration, the former grant will not be revoked, nor the other property of the deceased, nor his representatives, be thereby disturbed. I do not, therefore, see any substantial advantage in having the will transmitted. The administration might as well be granted on an office copy, except that it has been the usual practice to have the original transmitted: but I am inclined to grant this administration without ordering the will to be sent up; and thus the probate will not be rendered void. A practice prevailed, I understand, for two years, of granting such administrations without the will—or even a copy of it;—why it was discontinued I do

not know; but, in the present instance, I shall not enforce the monition for the transmission of the original will; and will reserve the consideration how the administration shall issue."

REVIEW.

The Practice of Conveyancing; comprising Rules for the Preparation and Examination of all ordinary Abstracts of Title, together with the Law of Evidence connected with the Title to Real and Personal Property. By James Stewart, of Lincoln's Inn, Esq., Barrister at Law. Vol. III. London, 1831. Saunders and Benning.

THE time has long gone by, when the library of the student or practitioner in the law might be confined comparatively to a few works of legal celebrity, and ponderous character. The standard folio is no more. Those works, each the occupation of a life, which exhausted not only the immediate subject of enquiry, but all its most remote relations, are no longer composed by the "learned in the law" of these latter days. The principle of the *division of labour* has been admitted into the Inns of Court, as completely as into the manufactories of Manchester and Glasgow.

One other improvement we would suggest: whilst we approve of the division of labour, we would recommend a *unity of purpose.* Why should not lawyers associate (as, indeed, in a few instances they have done) in producing those elaborate works, the magnitude and variety of which cannot be mastered by the limited strength and labour of one individual. If it has been found advantageous in the composition of works of imagination, as in the instances of Beaumont and Fletcher, where it is difficult to anticipate a unity of design, — unless, indeed, the one invented the plot and incidents only, and the other the poetry and sentiment, — if, however, these literary partnerships have proved beneficial, *à fortiori* it must be advantageous to the compilation of a work of extensive legal erudition, to associate the varied powers and capacities of skill, knowledge, and industry, which belong to different minds. The utility of such a plan has been somewhat exemplified, we trust, in the pages of "The Legal Observer:" and it is in a great degree by the co-operation of many contributors, that we have wended our way with success.

In making these remarks, we by no means intend to intimate that the author of the work before us has undertaken a labour which would have been better executed in conjunction with other men of learning and experience. He has chosen a department of the laws of property which he has ably expounded in all the bearings of that particular subject — a department, indeed, of more importance to the general practitioner than any other we could point out. Our remarks rather apply to the suggestion of the union of the talents of writers, who, like our author, have "gained a name" in legal literature, towards a still wider sphere of exertion and utility, than any disposition to under-rate the value of those individual labours, without which no branch of the profession could perform their important duties with effect.

Having given this hint, after the manner of the critical fraternity, who must always maintain that books are imperfect, we proceed to our vocation in reviewing the merits of the work before us.

For the purpose of giving a more distinct view of the contents of this volume, we may state its leading divisions to be as follow: —

First, The form of the abstract, the rules for abstracting, the duties of counsel and solicitors, the general nature of the title, and the time of its commencement.

Secondly, Of titles to the *ordinary* kinds of property, as freehold, copyhold, real chattels, incorporeal hereditaments, and personalty; *peculiar* kinds, as Crown land, manors, rectories, pews, colonial property, &c.; and conditional and contingent estates and possibilities.

Thirdly, Of titles derived through particular persons, as co-tenants, trustees, executors, administrators, guardians, assignees, corporations, and persons labouring under legal disability.

Fourthly, Of the various modes of deducing titles, under wills, descents, decrees, exchanges, powers, fines, recoveries, disseisin, warranty, estoppel, limitation, prescription, inclosures, and encroachments.

Fifthly, Of defects of title, and indemnities against them.

Sixthly, Of evidence to support the title, and the doctrines of presumption.

This being the general outline of the nature of the work, it is due to the author, and the importance of the subject, to enumerate the details, from which it will appear he has left no part of the system untouched that can be useful to the property lawyer. Independently of the necessity, in a review of this kind, of presenting a complete analysis of the contents of the book in the manner which the author has deemed it best to adopt, we think that the statement of the *items* (as it were) of this vast sum of legal science will be interesting to every profes-

sional reader, as well as to the student of this branch of law in particular. The following, then, is the substance of the contents of each chapter: —

1. The *form of the abstract*, and the rules for abstracting deeds, wills, and other legal documents; comprising freehold property, and property not freehold: as copyholds, leaseholds, lands in ancient demesne, and personalty.

2. The *professional duties* connected with abstracts of title, comprising the duty of the vendor's solicitor, the duty of the purchaser's solicitor, and the duty of counsel.

3. The general nature of the title to be produced.

4. The commencement of abstracts of title.

5. Abstract of title of *freehold property*, under tenants in fee, in tail, for life, pour auter vie, under remainder-men and reversioners, and tenants of cross-remainders.

6. *Copyhold* and other *customary* property: namely, copyholders, customary freeholders, enfranchised copyholders, and tenants in ancient demesne.

7. *Leaseholds* and *chattels real:* as leaseholds, terms for years in gross, attendant terms, tenants from year to year, tenants by statute merchant, &c.

8. *Incorporeal hereditaments:* advowsons, tithes, rights of common, rights of way, franchises, offices, annuities, and rentcharges.

9. *Personal chattels:* legacies, policies of insurance, stock in the public funds, shares in companies, next presentations, ships, literary property, goods, good wills.

10. Title under *co-tenants:* tenants by entireties, joint-tenants, coparceners, tenants in common, partners.

11. Title under *trustees*, &c.: trustees for sale, trustees of charities, executors, administrators, guardians.

12. *Bankruptcy* and *insolvency:* assignees of bankrupts, bankrupts, assignees of insolvent debtors.

13. *Corporations*, lay and ecclesiastical persons.

14. Wills, descents, decrees of courts of equity, and equitable titles, exchanges, and powers.

15. Fines, recoveries, disseisin, warranty, estoppel, statute of limitations, prescription.

16. *Persons under legal disability:* infants, married women, idiots, lunatics, persons of unsound mind, felons, traitors, aliens and denizens, excommunicants, outlaws, persons out of the jurisdiction, roman catholics, bastards, churchwardens.

17. *Enclosure acts and encroachments:* allotments, exchanges under enclosure acts, encroachments on waste lands.

18. *Conditional* and *contingent* estates, and interests and *possibilities*.

19. *Peculiar property:* land from the Crown, manors, rectories, and chapels, pews and vaults, slaves and colonial property, company's shares, under land-tax acts, equities of redemption.

20. *Defects in abstracts:* Judgments and recognizances, Crown debt, non-compliance with registry acts, annuities, rents, debts, legacies, and portions, dower and curtesy, mortgages, loss, or non-existence of deeds, insufficient description of parcels, decrees, lis pendens, leases, fines, recoveries, and feoffments, purchase by trustees of church property, voluntary and fraudulent conveyances, illegitimacy, breaches of trust, and destruction of contingent remainders.

21. *Indemnities against defects.*

22. *Evidence of contents of abstracts.* I. Ordinary contents of abstract: deeds, wills, and letters of administration, court rolls, fines, recoveries, acts of parliament, records and proceedings in parliament. II. Facts referred to in the abstract: births, deaths, marriages, intestacy, legitimacy, death without issue, executorship and administratorship, title, bankruptcy, discharge of insolvent debtors, enrolment, heirship, bachelorhood, identity, payment of money into court, payment of legacies. III. Miscellaneous evidences: public books, parliamentary surveys, terriers, pedigrees, family documents, bishops' registers, entries, maps, awards, certificates. IV. Secondary evidence: copies, drafts, abstracts, extracts, recitals.

23. *Admissibility of parol evidence* on the examination of abstracts.

24. *Presumptive evidence of grants.*

25. Presumption of *conveyances of legal estates.*

26. Presumption of *surrenders* of life estates and terms.

27. Presumption of certain *assurances and documents, and ceremonies* necessary to their validity: I. Licences, releases, copyhold assurances, fines and recoveries, acts of parliament, reservation. II. Signing deeds, &c., enrolment and registry, livery of seisin, interlineations, stamping, priority.

28. Presumption of *satisfaction of debts* and charges: mortgage, bond and simple contract debts, judgments and decrees, annuities, rent, portions, legacies, covenants, lien.

29. Presumption of *waiver* and *acquiescence:* waiver of forfeiture, of rights and privileges, of equitable claims of next of kin, of creditors, of claims under settlements, between trustee and cestui que trust, of equities of redemption, general rules as to presumption of waiver.

30. *Other presumptions:* payment of charges, insanity, consideration, cross-remainders, title, husband and wife, undisposed-of revenue.

31. Admissibility of *unstamped instruments* in evidence, and the *compulsory production* of instruments.

32. *Miscellaneous points.*

Having thus stated the objects of the work, and the plan of its execution, we proceed to make some extracts which will not only illustrate its execution, but be considerably useful to a large class of our readers.

The work, as we have seen, is devoted to the *practice* of conveyancing, the rules for the preparation and examination of abstracts of title, and the law of evidence, connected with the title to real and personal property. In noticing the principal

object of the work, our best course will be to leave the writer to speak for himself.

"It appeared to him that a work which should show the exact state of the law, at the present time, respecting abstracts of title, and the alterations effected in it during the present century, would be both new and useful. The able work of Mr. Preston on Abstracts of Title is necessarily defective in these particulars.

"The law of evidence, as it regards the title to property, has hitherto remained either altogether unconsidered, or has been merely treated of incidentally. Its importance seemed to demand a more careful consideration, and the author hopes that this part of the present volume will at least be found useful.

"The author has endeavoured to touch as lightly as possible on those parts of the subject which have been considered by other writers, and to dwell only on those which have remained uninvestigated. For this reason, the nature and qualities of estates have been mentioned so far only as was necessary to introduce the rules on the matters immediately under consideration.

"In the arrangement of the work, the preference has been given to that which appeared the most practically useful, rather than that which was the most scientific."

The author observes, that it was formerly the practice to deliver the title deeds to the purchaser, whose solicitor prepared the abstract at his expense, and then the abstract was compared with the title deeds by the counsel before whom it was laid. The authority for this statement is Sugd. Vend. & P. 381., citing *Temple* v. *Brown*, 2 Taunt. 60., but (as the author remarks) this fact does not appear from the case.

It now, however, seems clear that the purchaser has a right to call for an abstract at the vendor's expense, and he is not obliged to take the deeds themselves in lieu of an abstract, and may, if it be refused, enforce its delivery by a bill in equity.[a]

This is evidently the more safe and convenient practice. On the one hand, the vendor retains his title deeds until he has received the purchase-money; and on the other, the purchaser incurs no risk of the expense of preparing the abstract.

Mr. Stewart then proceeds to give some practical directions regarding abstracts of title.

"Very great care and attention, and considerable knowledge, are required to prepare a correct abstract of title. The immaterial parts of the deeds, wills, and other documents to be abstracted, should be slightly noticed; the material parts should be fully given, and often set out *verbatim*. The abstractor, to do this correctly, must not only have a great familiarity with the parts and language of legal documents, but must also know the principles by which they are framed and construed.

"We shall now consider, in the first place, the proper form in which an abstract should be prepared; and then mention the particular rules for abstracting the instruments which it usually contains.

"It will be found useful, before commencing the abstract, to draw up a short account of all the documents to be abstracted, mentioning their dates, nature, and effect.

"A head or title is always given to the abstract, in which the situation of the property to which it relates, the name of the owner, and his estate or interest therein, should be shortly mentioned. The particular parcels to which the title relates are also sometimes mentioned.

"If the lands are of peculiar tenure, as copyhold, gavelkind, &c., it should also be mentioned in the head of the abstract. And if the lands are in Kent, it should be noticed whether they have been disgavelled. It is also usual to mention any qualification with which the premises are sold.

"The wills, deeds, fines, recoveries, acts of parliament, &c., should then be abstracted in the order of their dates; all the material parts being given at length, and the unimportant parts being simply referred to. Sometimes, however, it will be proper to arrange the abstract differently. Thus if it relate to different parcels of land, or different terms of years, which have been purchased or assigned at different times; or where the property has become vested in several persons as tenants in common, co-parceners or joint tenants, who have severed the tenancy, and there is a different deduction of title to the different shares, in such cases it will be proper to arrange all the deeds, &c. relating to any one portion together, and to head that part of the abstract with, '*As to the farm called A.*' &c., or '*As to the third part or share of B.*' &c. and thus throughout the abstract. So where there is a first and second mortgage of the same lands, which have been transferred from time to time to different persons, it will be proper to depart from the strict chronological order of the deeds.

"So, also, it frequently happens that different parts of the lands to be sold or mortgaged are held under different titles. In such cases there should either be separate abstracts of each part of the property, or all the deeds which relate to one part should be first abstracted, and then the deeds which relate to the other part should be given. By this means much confusion is prevented.

"Where the title of freeholds and copyholds is connected, the freehold abstract should contain the equitable title of the copyholds, and the legal title of the copyholds may be contained in an accompanying abstract. If the premises are distinct, there should be separate abstracts.

"Where an abstract is prepared with a view to show the title to different properties which have been purchased by different persons, a statement of the particular lands which have been purchased by the person on whose behalf counsel is instructed to advise, should accompany the abstract, and the instruments which relate

[a] 1 Prest. Abs. 34.

to them should receive some mark of distinction.[b]

"Besides abstracting all the documents of the title, all such facts as will elucidate the title, as deaths, marriages, births, descent, &c., should be stated in the abstract according to the time of their occurrence, and these facts must be verified by the proper legal evidence.[c]

"Entries by disseisin, abatement, intrusion, &c., where they have existed, should also be stated.[d]

"If the premises are of a different nature, as partly freehold and partly copyhold or leasehold, there should be separate abstracts of each kind of property.

"The abstract should commence with a deed or will at least sixty years back, and which makes no reference to any prior assurance. The instances where it will be necessary to furnish a title of a remoter date, will be more properly considered in a subsequent part of this work; but, except in these cases, it will not be advisable to go further back in the title than sixty years, although perhaps a purchaser may insist on the production of all the documents in the possession of his vendor. The rules as to the commencement of the abstract will be hereafter fully adverted to.

"It will be useful to mention, at the foot of the abstract, whether the vendor or mortgagor is married, and if so, whether the wife is dowable out of the lands to be sold or mortgaged.

"Here may also be noticed any peculiarity in the situation of any of the parties to the transaction.

"The legal and equitable titles should be deduced to the vendor or mortgagor, or his trustees, or it should be shown that he has the means of obtaining conveyances of them from the parties in whom they are respectively vested. The history of all terms of years should also be brought down to the time of delivering the abstract, and it should be shown whether they have been merged or in whom they are vested. The discharge and satisfaction of all incumbrances and charges must be clearly shown in the abstract, and must be verified by the proper evidence.

"It should also be shown which of the title-deeds are in the possession of the vendor, or of which he possesses copies, and in what way he can enforce the production of the originals."

The instructions regarding the mode of abstracting the essential parts of deeds, wills, and documents, are clear and valuable.

From the chapter on professional duties we make the following extracts regarding those of the *vendor's solicitor:* —

The author observes, that though the solicitor will often be able to produce a title much more remote than sixty years, it will be generally imprudent to do so, as it must increase the expense, and may give rise to useless and embarrassing enquiries.

"The vendor's solicitor should suppress no fact or deed material to the title, but it frequently happens that it may be perfectly correct to omit particular deeds in the abstract. Thus leases which have expired may be omitted, and where a particular charge on the property, which is not referred to in any of the other deeds, has been clearly satisfied, it seems useless to insert the deeds connected with it in the abstract; but if, as is generally the case, it is mentioned in any deed connected with the other parts of the title, or if there be any doubt of its complete satisfaction, the deeds must be abstracted.

"It is proper, however, to mention that Lord Kenyon has said that the abstract ought to mention every incumbrance whatever, affecting the property included in the abstract.[e] And Mr. Preston is of the same opinion.[f]

"And where there is a mere presumption of the satisfaction of the charge or incumbrance, the deeds should always be abstracted, because the presumption may be rebutted by contrary evidence, and then it will not avail."[g]

It appears that the court will not exercise its summary jurisdiction to compel a vendor's solicitor to perform an undertaking given by him at the sale, to do certain acts for clearing the title to the estate.[h]

"If the property has remained a considerable time in one family, or is of great extent and importance, it will always be prudent, before a sale or mortgage, to submit an abstract of the title to counsel, on behalf of the vendor. By this means the real difficulties and defects of the title may be known and remedied before it is brought into the market. Or if the defects cannot be remedied, they may be provided for by the articles of sale, which may restrict enquiries beyond a certain date, or specify that the title is open to certain objections, and must be taken subject to them.[i]

"If the lands are sold by public auction, it seems doubtful whether articles of sale, providing that the purchaser shall take a defective title, would be held to be valid. Thus in a late case from Scotland, where the vendor stipulated at a public auction, by the articles of sale, to deliver certain specified deeds, which were described as 'all the deeds in his custody,' such a provision was held to be void; Lord *Eldon* C. observing, that he never heard that because a vendor provides by the conditions of sale that he will give to the purchaser only certain specified deeds, that the purchaser must take such title as appears upon the deeds.[k] But it is clear that the vendor may stipulate by private agreement that the purchaser shall accept the title such as it is[l]; and that a purchaser may waive his right to a good title by concluding an agreement after he has full notice that he is not to

[b] See 1 Prest. Abs. 38.
[c] Idem, 48.
[d] Idem, 43.
[e] *Richards* v. *Barton*, 1 Esp. N. P. C. 268.
[f] 1 Prest. Abs. 64.
[g] See *Barnwell* v. *Harris*, 1 Taunt. 430.
[h] *Peart* v. *Bushell*, 2 Sim. 38.
[i] See the proper forms, Vol. II. 21—27.
[k] *Dick* v. *Macdonald*, 1 Bli. N. S. 661.
[l] *Wilmot* v. *Wilkinson*, 6 B. & C. 506.

expect a title beyond a limited period. That may be matter of notice and not of contract.[m] And even on a sale by public auction stipulations of this nature will sometimes be allowed."

The particular time at which the abstract should be delivered is generally mentioned in the contract for sale, and the abstract should be punctually delivered at the time appointed.

"If the abstract is not then delivered, the purchaser may at law avoid his contract[n]; and it will also be avoided in equity, except in cases where the vendor has used all due diligence, but has been prevented by insuperable difficulties from fulfilling his contract[o]; or perhaps where the purchaser has neglected to take the proper steps in calling for the abstract.[p] But it is now settled that time may be made the essence of the contract as well in equity as at law.[q] And in a late case Lord *Eldon* expressed his disapprobation of the principle, which allows a vendor to deliver the abstract behind the appointed period.[r]

"If there be no time stipulated for the delivery of the abstract, it must be delivered as soon as it can be reasonably prepared.

"Upon the delivery of the abstract, the vendor's solicitor must be prepared to produce the deeds themselves to the purchaser's solicitor; and if they are not in his possession, but can be obtained by virtue of a covenant or otherwise, they must be produced, and the expense of such production, including journeys, if requisite, must be borne by the vendor. If the deeds themselves cannot be produced, the vendor's solicitor must furnish attested copies of them, for the purpose of being examined with the abstract."

In the next place, Mr. Stewart proceeds to consider the duty of the *purchaser's solicitor*, and observes: —

"Where a time is appointed for the delivery of the abstract, the purchaser's solicitor should take care to demand its delivery on or about that time, as he may otherwise be unable to enforce a specific performance of the contract.[s] If he wishes to rescind the contract, on the non-delivery of the abstract at the stipulated time, he should give notice to that effect to the vendor and demand the repayment of his deposit-money; for if he allow the time to pass by without any step of this kind, he will be held to have waived his right to take advantage of the negligence on the other side.[t] And if the abstract is delivered after the stipulated time, the purchaser's solicitor should only receive it, without prejudice to his client's right to take advantage of the neglect.[u]

"The purchaser's solicitor must compare the abstract most carefully with the original instruments there abstracted, and must see that the abstract contains a full and correct statement of them. And if he finds them incorrectly abstracted, he should, by a rider or by a correction of the abstract, supply a full and correct statement of them. The deeds are generally examined at the office of the vendor's solicitor; but wherever the deeds are, the purchaser's solicitor is bound to go to examine them; and, although it is a distant or inconvenient place, the vendor must pay the expense of the journey.[v]

"The purchaser's solicitor can only be exempted from his duty of examining the deeds by express contract with his client: but he is not bound to draw conclusions from the deeds; nay, if he does so, he does it at his peril; for he is bound to take the opinion of counsel on the deeds, and he is responsible to his client for giving a full and complete statement of the deeds or other documents on which he asks counsel's opinion.[w]

"It is the solicitor's duty also to see the whole of every instrument, and not to be content with an extract: and this rule applies particularly to wills. And he will be responsible to his client for any negligence in this particular.[x] But an action for the negligence of an attorney is barred, by the Statute of Limitations, six years after *default*, and not after discovery.[y]

"He should also see that the facts which support the title are properly and legally proved, and that they are supported by documents, which will be the best evidence of their truth in a court of justice.[z]

"A most important part of his duty also, is, to see that the deeds contained in the abstract have been properly stamped.

"After these points have been attended to, the abstract should be laid before counsel; and if the purchaser will not incur this expense, the solicitor should take a written memorandum from his client that such is the fact, and that it is against the solicitor's advice.

"On receiving the abstract from the counsel to whom it has been submitted, it will be the duty of the solicitor for the purchaser to follow up all the enquiries, and to insist on all the requisitions made in the opinion on the title therein contained. This part of his duty must be most carefully attended to, as it is of the greatest importance. The abstract must then be re-submitted to counsel, in order that he may

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[m] 3 Mer. 64. Sug. V. & P. 505., 8th edit. *Baxter* v. *Conolly*, 1 Jac. & Walk. 576.

[n] *Berry* v. *Young*, 2 Esp. N. P. C. 640., n.

[o] *Lloyd* v. *Collett*, 4 Ves. 689., n. *Paine* v. *Meller*, 6 Ves. 349. *Radcliffe* v. *Warrington*, 12 Ves. 326.

[p] See *Guest* v. *Homfray*, 5 Ves. 823.

[q] *Hudson* v. *Bartram*, 3 Madd. 440. And see *Boehm* v. *Wood*, 1 Jac. & Walk. 419. *Withy* v. *Cottle*, Turn. 78.

[r] *Lechmere* v. *Brasier*, 2 Jac. & Walk. 289.

[s] See *Guest* v. *Homfray*, 5 Ves. 818. *Ante*, p. 37.

[t] *Jones* v. *Price*, 3 Anst. 924.

[u] *Smith* v. *Burnam*, 2 Anst. 527. *Seton* v. *Slade*, 7 Ves. 265. And see *Lloyd* v. *Collett*, 4 B. C. C. 469. *Ante*, p. 37.

[v] *Sharp* v. *Page*, Sug. V. & P. 383., 7th ed.

[w] *Ireson* v. *Pearman*, 3 B. & C. 799.; Dow. & Ry. 687.

[x] *Wilson* v. *Tucker*, 1 Dow. & Ry. N. P. C. 33.; 5 Stark. 154. S. C.

[y] *Howell* v. *Young*, 5 B. & C. 259.

[z] See *Newell* v. *Smith*, 1 Jac. & Walk. 263.

judge whether his requisitions have been correctly followed.

"It is, also, the duty of the purchaser's solicitor to search for judgments, recognizances, crown debts, &c., and all other defects in the title, and to satisfy himself that there are none (besides those disclosed to him) which affect the title; and the usual searches can hardly ever be dispensed with advantageously.[a] And if a purchaser is damnified by his solicitor neglecting to search for incumbrances, it is clear that he may recover at law against the solicitor for any loss occasioned by his negligence.[b]

"He should also observe particularly that the wills, if any, have been duly signed and attested, that the deeds have been executed by the proper parties, and that the execution by them has been duly attested, and that the receipt for the consideration-money has been endorsed and signed.

"His attention should also be particularly directed to the parcels. The observations made in the first chapter, on the proper parts of the instruments to be abstracted, will be a guide to the purchaser's solicitor in this part of his duty.

"He must also see that the deeds or wills have been duly registered and memorialized, where these ceremonies are required."

Other equally valuable advice is then given regarding purchases of property of small value. In cases also in which there is a suspicion of concealment of any circumstances relating to the title, the best course of proceeding is pointed out.

In case of the discovery of incumbrances, the mode of procedure is described; and judicious advice is given where the purchaser is desirous to complete the contract before the investigation of the title has been completed.

The section on the duty of counsel shows an anxious regard that the important part of the investigation devolving on them should be vigilantly performed.

We should not consider ourselves justified in making other selections from this volume, which abounds with useful matter relating to the law of real and personal property.

IMPRISONMENT FOR DEBT.

ENQUIRIES OF THE COMMON LAW COMMISSIONERS.

In a recent Number (Vol. II. p. 25.), we inserted the questions of the Common Law Commissioners, on imprisonment for debt on *mesne* process. We now subjoin the queries which have been forwarded by the secretary of the commissioners, for the purpose of collecting the evidence and opinions of practitioners regarding imprisonment on *final* process.

FINAL PROCESS.

1. When payment has been obtained, is it usual to proceed against the person until after process has been issued against the property, in cases where there is property?

2. Is it usual to proceed against the person where the creditor is unable to obtain payment of the debt from the debtor's property?

3. Where the debtor is not suspected of fraud in withdrawing or concealing his property, so as to evade the creditor's execution, is it usual to issue process against the person?

4. Is execution against the person usually productive of payment to the creditor, when the debtor fraudulently withdraws, or conceals, or assigns his property?

5. In your judgment, would it be desirable to render the property and beneficial interests of every description belonging to debtors more accessible to the claims of judgment creditors?

6. What do you conceive would be the best means of accomplishing this object, and preventing debtors, by the concealment or removal of their property, from evading the effect of the judgment?

7. Is it more usual for a defendant to resort to the insolvent acts, when he is arrested on mesne or on final process?

8. What is the operation of the insolvent act in reference to debtors? In particular, does it hold out temptations to fraudulent concealment? Does it affect the moral habits of debtors? Does it afford effectual relief to the debtor?

INCREASE OF THE NUMBER OF ATTORNEYS.—ADMISSION IN EASTER TERM.

The following paragraph has gone the round of the newspapers:—

"During one term, no less than 242 articled clerks were admitted as attorneys of the Court of *King's Bench*, and upwards of 120 in the Court of *Common Pleas*. Prodigious! Reform it altogether."

This would lead us to the supposition that no part of the 120 (if there ever were such a number) admitted in the one Court, could be the same persons as those admitted in the other; and consequently, that 362 attorneys were enrolled in a single term, which on the average would be the enormous number of 1448 per year. Now, it is well known that almost every attorney

[a] See as to this, *post*, and *Forshall* v. *Coles*, 7 Vin. Ab. 54. pl. 6.

[b] *Brooke* v. *Day*, 2 Dick. 572. *Ireson* v. *Pearman*, 3 B. & C. 799.; 5 Dow. & Ry. 687.; Sug. V. & P. 486., 8th ed.

gives notice, and obtains admission into the Court of King's Bench, in which the far larger part of business is transacted; and he is entitled to admission in the other Courts without notice, on producing his memorial of admission in the King's Bench. The admission of attorneys in the Common Pleas, who are not already attorneys of the King's Bench, are not more than two or three in the hundred.

It is evident, also, that this statement is founded on the supposition that all those who give notice of their intention to apply for admission, are actually admitted. We showed at the end of Hilary term that only 219 out of 343 had been admitted in the course both of that term and the preceding Michaelmas term.

The notices of intended application in the last term (Easter) were 137 in the King's Bench, and two in the Common Pleas, with four for re-admission. The whole number admitted in the former Court were ninety-nine. In the latter we are unable to state whether the admissions took place or not, as the secondary has declined to afford the information; but, taking it for granted that they were admitted, the number will be 101. The four re-admissions of course are not to be reckoned. There is thus, therefore, in three terms, a total increase of 320; being at the rate of less than 428, instead of 1448, annually. During that period, many reductions of the old members take place by death and by retirements from the profession; some ceasing to practice from choice, and others from necessity; with numerous other causes which may be readily supposed to operate amongst a body of nearly 10,000 men. We rather doubt, therefore, the urgency of creating new restraints on the admission of attorneys.

NOTES OF THE WEEK.

THE NEW ACCOUNTANT-GENERAL.

Mr. Adam, the King's Counsel, has been appointed Accountant-General. There can be no objection to this appointment, as far as Mr. Adam is concerned; but we are not at all surprised that it should have created considerable sensation in the Court of Chancery. The Accountant-General, in the first place, has always been a Master in Chancery; and it has been looked upon as one of those places to which barristers who had spent a long and laborious life in the Court of Chancery might properly lay claim. It is well known how few offices are open to the Chancery bar. The whole fifteen Judgeships, besides the subordinate offices of the Common Law Courts, are constantly filled from the Common Law bar; but the Equity bar have only three judicial situations and the Masterships to aspire to. There should be a fair distribution of the honours and offices among the whole body of the profession; at any rate, the small portion of them at present enjoyed by the Chancery bar should not be diminished. We regret, therefore, that the Chancellor should have chosen, on the score of personal friendship, to have overlooked the long-established usage of the profession, and have filled up this important situation from that portion of the bar that is least entitled to it. We sincerely trust that no further attack will be made upon what we cannot help considering as the just privileges of the Chancery bar.

NEW KING'S COUNSEL.

Wm. Fuller Boteler, Esq., and J. A. F. Simpkinson, Esq., have been appointed King's Counsel. We understand that the Lord Chancellor first mentioned the intended appointments to the King, at the dinner lately given by his Majesty to the Judges; and that the learned Gentlemen were sworn in the next day, before the warrants for their appointment had been signed. It is said they intend to practise exclusively in the Court of Exchequer.

SUPERIOR COURTS.

ROLLS' COURT.

DEVISE. — LEGACY.

If a legacy of 100*l. be bequeathed to be paid within a certain time, and if not paid, the legatee to have a life estate in lands, the legatee may claim the legacy after the given time is expired.*

In this case a testator devised lands to the defendant, on condition that he should pay to the plaintiff a legacy of 100*l.*; and directed, that if this sum should not be paid, either by the neglect or the refusal of the defendant, within a year after his death, then the plaintiff should have a life interest in the lands. The legacy was not paid within the year, and the present bill was filed to compel its payment, the legatee preferring it to the life estate.

On the part of the defendant, it was contended, that the right of the plaintiff was barred, she having refused the life estate in the property which had been offered to her by the defendant. This, however, was not satisfactorily proved.

The *Master of the Rolls* considered that the plaintiff's claim to the 100*l.* was unimpeached, and granted the prayer of the bill.—*Bell* v. *Skelton.* May 9. 1831.

COTTEREL V. LORD KENSINGTON.

The objection taken by Mr. *Rogers* on the hearing on behalf of the defendant, Lord Kensington, had been raised in the first stage of the proceedings (*i. e.* by the defendant's answer); and it was, that one of the parties, who was connected with the *plaintiff*'s ancestor, and to whom Lord Kensington had covenanted to pay the money, was not a party to the record, which the Court said undoubtedly he ought to be. The matter was then arranged by allowing the plaintiff to correct the defect. — *Cotterel* v. *Lord Kensington*, reported *antè*, p. 60.

VICE CHANCELLOR'S COURT.

INJUNCTION. — STAMP.

If a manufacturer affixes a particular stamp to his goods, another person will be restrained from using it.

Mr. *Pepys* moved for a special injunction *ex parte* under the following circumstances: — The plaintiffs' father was a manufacturer of files at Warrington in Lancashire, and died in 1806, leaving his business to the plaintiffs. They now carry it on, and stamp their files with their name, Stubbs, prefixing the letters W. S. crosswise. The defendant had sold files bearing the same name, but placing a small letter at the end of the name. These facts being supported by affidavits,

The *Vice Chancellor* granted the injunction. —*Stubbs* v. *Woolley.* V. C. May 23. 1831.

COURT OF KING'S BENCH.

PRACTICE COURT.

COSTS. — WELSH JUDICATURE.

The Court has power, under the 11 *Geo.* 4., *and* 1 *Wm.* 4. *c.* 70. § 15., *to direct the taxation of an attorney's bills for business done at the Great Sessions of Wales, now that jurisdiction is abolished, although the party desirous of taxing them has delayed three months in making the application.*

Langslow showed cause against a rule obtained by *John Evans*, calling on the defendant to show cause why the bills of costs comprising his set-off should not be referred to the Master to be taxed. The action in this case was commenced in the month of December, 1829, for the balance of an account. The defendant pleaded the general issue; and gave notice of set-off for business done by him as an attorney for the plaintiff in the Welsh Courts, and delivered particulars in March, 1830. In Trinity term, in the same year, the defendant withdrew his plea; and pleaded it again, with notice of set-off, and paid the sum of 57*l.* into court generally. In the month of November last, a summons was served on the agents of the defendant, to show cause why the bills should not be referred to the Master for taxation. On the hearing of that summons, Mr. Justice *Littledale* and Mr. Justice *Patteson*, who were severally attending, refused to make orders, on the ground, that the business was done in the Welsh Courts, which were, by the 11 Geo. 4. and 1 Wm. 4. c. 70. § 14., abolished after the 12th October (§ 39.) in the year 1830; and they therefore conceived, they had no authority to order the bills to be taxed. He should submit, that the Court had no authority to direct those bills to be taxed. By the 2 Geo. 2. c. 23. § 23. it was provided, that an attorney's bill should be taxed by the officer of that court "in which the business contained in such bill, or the greatest part thereof in amount or value, shall have been transacted." Here the whole business had been transacted in the Court of Great Sessions; therefore the proper court, according to the act of parliament, for the taxation of the bills, was the Court of Great Sessions. If he had chosen so to do, the plaintiff might have had them taxed there at any time, from the month of March till the month of July. Instead of doing so, however, he let those three months pass; and now, when the Welsh judicature was abolished, he made this application to have the bills taxed by this court. With respect to the power of the Court to interfere in such cases, he should refer to the case of *Ex-parte Partridge and others* *, which was a petition to the Rolls Court, for a reference to the Master to tax the bill of costs of the solicitor of the petitioners in certain causes in the Court of Great Sessions at Cardiff. The order was made; and on a motion to discharge it, the *Lord Chancellor* took time to consider, and afterwards said, "he had looked into the case of *Ex-parte Uxbridge* †, and thought that it was not a sufficient authority for the order made in this case. There, business had been done by a solicitor, who refused to deliver up the deeds and papers in his possession. The Court had clearly jurisdiction to order him to deliver up the deeds and papers: but, to do justice between the parties, it was necessary that any lien which the solicitor might have for costs should be first discharged; and to ascertain the amount of such lien, taxation was requisite. So that there, the taxation was consequent upon the order to deliver up the deeds and papers; but here, there was no detention of deeds, as the solicitor had told the party to take them whenever he pleased; and it appeared, that he had taken such as he thought proper." His Lordship added, "that none of the cases referred to appeared to him to go the length of this; namely, to authorise the taxation of a solicitor's bill for business done in the Court of Great Sessions, when nothing beyond costs was in dispute. The order was subsequently discharged. Now this, he conceived, was an authority clearly to show that the Court could not interfere to direct the taxation of an attorney's bill for business done in the Court of Great Sessions. If that court still existed, he submitted that the plaintiff could not have come to this court, and required the Master of this

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* 2 Merivale, 500.

† 6 Ves. 425.

court to tax those costs. Then, what had the act of parliament, to which reference had been made, done? The 13th section gave jurisdiction to the Court in all matters then pending in the Welsh Courts. But the bills here were for business not pending,—business which had long since been concluded. So that the statute did not aid this application in any respect. The question then was, whether the defendant, after his delay, and when the persons really competent to tax the bills—namely, the officers of the Welsh Courts—no longer existed, was entitled to have the bills taxed by the Master of this court. In the case of *Hooper* v. *Till and Wife* *, Lord *Mansfield* observed, "If the business was really done, the delay of the defendant for more than a month in objecting to the *quantum*, is an admission that he thinks *that* reasonable." Now here the defendant had remained three months without objecting.

Taunton J. It is every day's practice to refer the bill, though the month has elapsed.

Langslow. Yes, my Lord; but I wished to show that the *laches* of the defendant have deprived him of the opportunity of having the bills taxed by a competent person; for now there is not, in fact, an officer competent to tax those costs.

John Evans submitted, that the Court had authority to tax an attorney's bill for business done at the Great Sessions of Wales. It was so laid down by Mr. Tidd †, in his *Practice*:—"A bill was referred to be taxed for business done in a criminal suit in the Court of Great Sessions at Carmarthen; and though it was objected, that it would be impossible for the Master to tax the costs in Wales, not knowing the practice there, yet the Court held, that he could as well tax these costs as costs in the Spiritual Court; and if he were at a loss, he might call in assistance." For this statement he cited the case of *Lloyd* v. *Maund*. ‡ But there was no occasion to have recourse to the authority of Mr. Tidd on this subject, for the act of the 11 G. 4. and 1 W. 1. c. 70. § 13. clearly gave power to the Court to direct the taxation of these bills. The words of that statute were, "And be it further enacted, that from and after the commencement of this act, his Majesty's writ shall be directed and obeyed, and the jurisdiction of his Majesty's Courts of King's Bench, Common Pleas, and Exchequer respectively, and of the several Judges and Barons thereof, shall extend and be exercised over and within the county of *Chester*, and the county of the city of *Chester*, and the several counties in *Wales*, in like manner, to the same extent, and to and for all intents and purposes whatsoever, as the jurisdiction of such courts respectively is now exercised in and over the counties of *England*, not being counties palatine, any statute heretofore passed to the contrary notwithstanding." By this statute it must be evident that the Court had power to direct the taxation of these bills, even though the plaintiff had lost three months.

* Douglas, 189. *Vide* also *Anderson* v. *May*, 2 B. & T. 237.

† 1 Tid. Prac. p. 329. ed. 9.

‡ T. 25 Geo. 3. K. B.

Taunton J. I am of opinion that this rule should be made absolute. For without deciding which is the best authority, that of Tidd or of Merivale, the late act of parliament "for the more effectual administration of justice in England and Wales," as it is sometimes called, was clearly intended, at the time it abolished the Welsh jurisdiction, to give the same degree of jurisdiction to this court, which the courts of that jurisdiction would have been entitled to exercise. Now, it is quite clear, that notwithstanding the *laches* of the plaintiff, it would have been competent to the Court of Great Sessions to have referred this bill to be taxed. This court having the same power as the Court of Great Sessions, it has power to direct the reference of them to taxation. The rule must therefore be absolute.

Rule absolute.—*Price* v. *Davies*, Gent., one &c. E. T. April 18. 1831.

EXAMINATION ON INTERROGATORIES.

In an application under the 1 *Wm.* 4. *c.* 22. § 4. *to have a witness within the jurisdiction of the Court examined on interrogatories, the name of the person, before whom the examination is to take place must be mentioned before the rule* nisi *will be granted.*

Thesiger applied for a rule to show cause why an order for the examination of a witness of the age of 92 years, resident at Bath, should not issue. He made this motion on the new act introduced by Lord *Tenterden*, the 1 Wm. 4. c. 22. § 4., by which it was provided, "That it shall be lawful to and for each of the said Courts at *Westminster*, and also the Court of Common Pleas of the county palatine of *Lancaster*, and the Court of Pleas of the county palatine of *Durham*, and the several Judges thereof, in every action depending in such court, upon the application of any of the parties to such suit, to order the examination on oath, upon interrogatories or otherwise, before the Master or Prothonotary of the said court, or other person or persons to be named in such order, of any witnesses within the jurisdiction of the court where the action shall be depending; or to order a commission to issue for the examination of witnesses on oath, at any place or places out of such jurisdiction, by interrogatories or otherwise; and by the same, or any subsequent order or orders, to give all such directions touching the time, place, and manner of such examination, as well within the jurisdiction of the court wherein the action shall be depending as without, and all other matters and circumstances connected with such examinations as may appear reasonable and just."

Taunton J. What is the name of the person before whom you propose that the examination should take place?

Thesiger. There will be no difficulty in agreeing as to some gentleman.

Taunton J. Yes, that may be; but the name must be mentioned before I can grant a rule.

On a subsequent day in the term, the name of a gentleman was mentioned, and the rule was granted accordingly.

Rule granted. — *Doe* d. *Thorn* v. *Phillips*. E. T. May 2. 1831.

ESSOIGN DAY.—TRINITY TERM.—EJECTMENT.

By the 1 *Wm.* 4. *c.* 3. § 1., *the first day of Trinity Term is the* 22*d of May, even though that day of the month falls on a Sunday, and consequently the essoign day, by* § 2. *of the same act, is the* 19*th of May.*

White moved for judgment against the casual ejector. The service was on the 19th of May, which he submitted was the day before the essoign day, according to the proper construction of the 11 Geo. 4. & 1 Wm. 4. c. 70. § 6. That act provided, that Trinity term should commence on the 22d of May, and that "the first essoign, or general return day, for every term, shall be the fourth day before the day of the commencement of the term, both days being included in the computation: the second essoign day shall be the fifth day of the term; the third shall be the fifteenth day of the term; and the fourth and last shall be the nineteenth day of the term; — the first day of the term being included in the computation; — with the same relation to the commencement of each term as they now bear; and shall be distinguished by the day of the term on which they respectively fall—the *Monday* being in all cases substituted for the *Sunday*, when it should happen that the day would fall on *Sunday*." Now, Trinity term properly beginning on the 22d, and that day being a Sunday, it must commence on Monday the 23d.; and then the essoign day being the fourth day before the term, both days inclusive, it must be Friday the 20th, and therefore Thursday the 19th must be the day before the essoign day. Mr. Tidd, in his Supplement*, was of opinion, that *Monday* was the first day of the term. That opinion supported the view he had taken. Several other declarations in ejectment had been served under the impression, that this was the right construction of the act. It was also the opinion prevailing in many of the offices.

Patteson J. Yes; that would be the rule, according to the 11 Geo. 4. and 1 Wm. 4. c. 70. § 6.; but since that act, the 1 Wm. 4. c. 3. has been passed. That statute, in the first section, proceeds, "Whereas by an act passed in the last session of parliament, intituled *An Act for the more effectual Administration of Justice in England and Wales*, it was, amongst other things, enacted, that the essoign and general return days of each term should, until further provision be made by parliament, be as follows; that is to say, the first essoign or general return day for every term shall be the fourth day before the day of commencement of the term, both days being included in the computation; the second essoign day shall be the fifth day of the term; the third shall be the fifteenth day of the term; and the fourth and last shall be the nineteenth day of the term; the first day of the term being already included in the computation, with the same relation to the commencement of each term as they now bear; and shall be distinguished by the day of the term on which they fall, the *Monday* being in all cases substituted for the *Sunday*, when it shall happen that the day would fall on *Sunday*; except always, that in Easter term there shall be four returns instead of five, the last being omitted." It then proceeds to repeat the whole of that portion of the previous act which it has recited, and makes no provision for cases in which the day of a term's commencing shall be a Sunday. The provision of the 11 Geo. 4. and 1 Wm. 4. c. 70. § 6., directing Trinity term to commence on the 22d of May, remains in force. The 1 Wm. 4. c. 3. § 2. provides, that the first essoign or general return day shall be "the third day exclusive before the commencement of each term." That makes the essoign day of the term the 19th.

White. Your Lordship observes that this is a declaration, and not a writ.

Patteson J. Yes; but by the rule of this Court † the time of serving declarations in ejectment is made dependent on the time when the essoign day falls. I am myself of opinion that the service is clearly bad; and such, I believe, is the opinion of the other Judges. The question, as to which is the essoign day, is now before the other Courts. I shall meet the other Judges on Wednesday; I will consult with them on the subject, and let you know the result of my enquiries on Thursday.

On the Thursday, in the course of the day, the opinion of the Judges was communicated by

Patteson J. I have spoken to the other Judges; and we are clearly of opinion that *Sunday* was the first day of the term, and consequently that the essoign day was the 19th. Declarations in ejectment, therefore, which were served on the 19th, are irregular. But as that bad service has arisen from a mistake, which has extended to some of the officers, the Court will relieve all persons who have served declarations on that day, as the necessity for serving declarations in ejectment depends on a rule of our own Court. We have therefore determined that those persons who have so served their declarations shall have judgment against the casual ejector, but shall not sign their judgment until they have served their rule for judgment on the tenant in possession, in order to enable him to come here if he thinks fit. The rule will be served three days before signing judgment in town causes, and six days in country causes. We, however, do not do this, in order to enable parties to come in and show cause, on the ground that the service was on the 19th instead of the 18th, and that we shall discharge the rule on that ground. Quite the contrary; but we direct this service of the rule merely to prevent the tenant in possession from being taken by surprise. In the case in which Mr. *White* moved, therefore, the rule for judgment must be served before judgment is signed. — *Doe* v. *Roe*. T. T. May 24. 1831.

A similar course was pursued in several other cases of ejectment, in which judgment against the casual ejector was moved for, which were awaiting the determination of the Court as to the real essoign day; as also in others moved since.

* P. 206. Appendix, note (*b*).

† Barnes, 172, 175. See 2 Tid. Prac. 1210.

ESSOIGN DECLARATIONS.

Patteson J., on the rising of the Court, intimated to the Bar, that it would be important for them to know, that the Court had determined, in the case of essoign declarations, not in ejectment, which were not delivered or filed till the 19th of May, the essoign day, the defendant would not be entitled to imparl to Michaelmas term. If the defendant imparled, he imparled at his own peril; but he for one should not make any order for an imparlance. — T. T. Monday, May 30. 1831.

NISI PRIUS.

ATTORNEY'S LIABILITY.

An attorney not liable to an action for negligence, for not delivering particulars of set-off, pursuant to a Judge's order, where the set-off could be given in evidence under the general issue.

Action against an attorney, for negligence.

Mr. Serjeant *Russell*, in stating the plaintiff's case, said he was not instructed to say any thing disrespectful of the general character of the defendant; but the plaintiff had a right to complain of his conduct in this instance, and to recover from him the loss he had sustained by his neglect.

The facts of the case were stated to be these: — Mr. Heathcote, being the proprietor of large collieries, employed a Mr. Thomas Ashworth, as a mineral surveyor, at a salary to be calculated at the rate of 4 per cent. on the land rental, and 10 per cent. on the minerals. In 1829, certain disputes arose, and an action was brought by Ashworth against Mr. Heathcote for arrears of salary, upon which 120*l.* were paid into court by the present plaintiff as the amount due, the rest of the demand being covered by payments received by Ashworth as agent, for which credit was given by him in account. It was thought necessary, however, to plead a set-off; and an order was obtained from Mr. Justice *Gaselee* on the 24th of July, calling upon Mr. Heathcote to deliver particulars of the set-off within four days, or that he should be precluded from giving evidence of it on the trial. Mr. Wilkinson's agent had previously written to inform him that the particulars would be required; but not receiving them, he again wrote on the 27th of July, to say that it was too late then to comply with the Judge's order, but it was of no consequence, as an application might be made to one of the Judges at Stafford, to allow the particulars to be delivered *nunc pro tunc*. On the 6th of August (the commission day at Stafford), Mr. Wilkinson personally served Ashworth with a copy of the particulars at Newcastle, and the following morning Mr. Baron *Vaughan* was applied to for his order; but, on hearing the nature of the case, and that the parties were willing to refer it, his Lordship said, "I shall make no order at present; it is a very fit case to be referred. I dare say (addressing Mr. Mousley, of Derby, Ashworth's attorney) you will consent to it." The next day the cause was called on, and referred to Mr. Malkin, the barrister; Mr. Baron *Vaughan*, on the 10th of August, making the order applied for, which was sought by Ashworth to be rescinded the day after, but his Lordship refused to do so. Mr. Malkin afterwards made his award, by which he found that Mr. Heathcote was indebted to Ashworth 60*l.* 10*s.* 2*d.*, but he had a set-off against him to the amount of 85*l.* 10*s.*; and if Mr. Baron Vaughan had power to make the order of the 10th of August, Mr. Heathcote was entitled to a verdict with costs. That question being raised upon the award, it was argued in the Common Pleas; and the Judges were all of opinion, that the learned Baron had no power to make the order after the cause was referred; and as the defendant in that action, by his own neglect, had failed to deliver the particulars in proper time, he was not entitled to insist upon his set-off. In consequence of that decision, Mr. Heathcote was compelled to pay Ashworth 60*l.* 10*s.* 2*d.*, and 433*l.* for costs, which he now sought to recover back from Mr. Wilkinson.

With respect to the law of the case, the learned Serjeant said, as it was the duty of an attorney, in the conduct of a cause, to protect the interests of his client, he was clearly liable for any injury arising from his neglect. It was said the defendant intended to rely on the plaintiff having himself interfered in the proceedings; but in the case of *Reece* v. *Rigby*, 4 B. & A. 402., where the plaintiff had undertaken that he himself would procure the attendance of a witness in a cause, the attorney was held liable for the damages occasioned by that witness's absence. In the present case, there was either negligence on the part of the agent, in not giving notice of the order of the 24th of July; or on the part of Mr. Wilkinson, in not furnishing the particulars in time; for either of which he was responsible.

The evidence for the plaintiff consisted of the various orders and proceedings in the action, at the suit of Ashworth. A clerk of Messrs. Alban and Benbow (Mr. Mousley's agents) proved the service of the order of Mr. Wilkinson's agent in London, before post-time, on the 24th of July, the summons before Mr. Justice Gaselee being attended by the agents on both sides. The judgment of the Court of Common Pleas was proved to the effect above stated, and an affidavit made by the present defendant on that occasion, in which he stated the correspondence with his agent, and that he was in fact unable to procure the particulars in time, owing to the distance from London, and Mr. Heathcote being from home at the time. It was, however, shown that that gentleman was at Langton Hall, or in the neighbourhood, at that period.

Mr. Ashworth was also called; and on producing his account book, it appeared that he had given Mr. Heathcote credit for sums amounting to 85*l.* 15*s.*

Mr. *Campbell* said it gave him great satisfaction to think that he was clearly entitled to a verdict; for it would have given him great pain if such an action had succeeded against a gentleman whose practice had been distinguished, not only by honour and integrity, but by diligence, assiduity, and zeal for the interests of his clients. He contended, that there was a total absence of that gross negligence which was necessary to make the defendant liable. It was laid down in *Laidler* v. *Elliott*, 3 B. & C. 738., S. C. 5 D. &

R. 635., and other cases, that there must be *crassa negligentia*, and that no attorney was answerable for the ill success of a cause. In a case at the present assizes it was held, that although a commission of bankrupt was declared to be invalid, the attorney was entitled to recover the expenses of suing it out. It was fortunate that actions for neglect of duty could not be brought against counsel; for although he (Mr. Campbell) endeavoured at all times to do his best, he had never been engaged in a cause in which he did not think, after it was over, that he might have done better. The law did not go far to protect attorneys; but still they were not liable to an action for an error of judgment. There must be gross negligence or fraud, in the first place; and, secondly, the damage must accrue from that negligence or fraud. In this instance, if there was any mistake, a Judge of one of the superior courts was a party to it. Mr. Baron *Vaughan*, it seemed, was mistaken in supposing he had power to make an order after the cause was referred; and therefore an attorney was not to be blamed if he fell into the same error. The time allowed by Mr. Justice *Gaselee*'s order was too short; and when the four days had expired, there was no remedy but to apply to a Judge on one of the circuits. In point of law, however, the arbitrator was mistaken in supposing a delivery of the particulars of set-off was necessary to entitle Mr. Heathcote to the benefit of it; for Ashworth's account might have been given in evidence under the plea of general issue, and it would have appeared that he was overpaid. The injury, therefore, which the plaintiff had sustained, was not attributable to any act or neglect on the part of the defendant, but to the mistake made by the arbitrator, for which the attorney was not answerable.

Mr. Justice *Bosanquet* stated the nature of the case, and summed up the whole of the evidence. There were two questions in the cause: — first, whether the defendant had been guilty of gross negligence in conducting the defence to Ashworth's claim; and, secondly, whether damage had accrued to the plaintiff from that negligence. The first was a question of fact for the jury upon the whole of the evidence; and the second his Lordship would decide, if necessary, upon their finding. The amount of the costs, 433*l.*, was the sum claimed, which the plaintiff ought to receive, if he could recover at all.

The Jury, after consulting for a few minutes, found a verdict for the plaintiff,—damages, 433*l.*

On being asked whether they thought there had been negligence, they replied in the affirmative.

His Lordship then said he was of opinion, on the second question, that in point of law the plaintiff could not recover, as evidence of the set-off might have been given under the plea of the general issue. The Court of Common Pleas had delivered their judgment entirely on the facts stated in the award. The jury, therefore, were directed to find a verdict for the defendant, with liberty to the plaintiff to move to enter a verdict for 433*l.* — *Heathcote* v. *Williamson*, Gent.

COURT OF EXCHEQUER.

NEW RULES.

"Whereas, since the statute of the 7th and 8th Geo. 4. c. 71., instances have occurred in which, upon proceedings in the Court of Exchequer, by way of subpœna and attachment, defendants have been arrested upon writs of attachment, notwithstanding the same have not issued for a bailable cause of action; and whereas it is desirable, that such a practice should be discontinued, it is, therefore, ordered, that from henceforth no arrest shall be made under any such writ of attachment, unless the same shall be for a bailable cause of action, and shall be duly marked and endorsed for bail."

The *Court* also made a rule, that it shall not in future be necessary to have a rule for the delivery of paper-books before the appointment of a day for argument, but that the rule for the argument shall be of itself sufficient.

MINOR CORRESPONDENCE.

ANSWERS TO QUERIES.

COSTS OF FI. FA.

THIS is one of a class of cases of great hardship; but in which, from the matter in dispute being of no great amount, and the parties being generally only too happy to get their money, the question of right can seldom be raised.

As to the point in question, I should rather be disposed to try it with the sheriff on an issue of false return. By the writ, he is required to levy the money of the defendant's goods and chattels; if he never offer the goods for sale, it can hardly be true that they remain on hand "for want of buyers," but rather for want of *being offered for sale*. To give additional force to this issue on the part of the plaintiff, it might be well to tender a purchaser to the sheriff (and he is not bound to sell by *auction*); after this he could hardly say there were no buyers: and if the price were inadequate — that is the sheriff's business — let him get more if he can, he has the means in his power.

PROBATE DUTY.

I should have thought it sufficient to have taken out probate in the first instance in the diocese where *C. D.* died, and for a *nominal* amount; it being clear, as I conceive, that the money was administered under *A. B.*'s will. I should not have hesitated to allow a client to swear to no effects, or none above 20*l.*, whatever were the amount of the sum *appointed*. Perhaps, as in case of freehold, probate was hardly necessary at all, but merely prudent for safe custody.

INCLOSURES. — TITHES.

I should think the rector of *A.* would *not* be entitled to tithe of the inclosure. The right is generally provided for by the act. Before the

inclosure the common was appurtenant to the land, and of course tithe-free. I can see nothing to make *A.* liable to tithe after the allotment.

ARREST.

It is difficult to say what is meant by *legally*. I do not think an indictment for perjury would lie on the affidavit of debt; but it would clearly be within the 43 Geo. 3. c. 46., and the plaintiff be liable to costs as for an arrest without probable cause. An action would also lie at common law as for a malicious arrest. — *Austin* v. *Debnam*, 3 B. & C. 139. To this extent such an arrest would be illegal. — *Dronefield* v. *Archer*, 4 B. & Ad. 513.

QUERIES.

WILL. — DIVISION OF PROPERTY.

A. dies, leaving a widow and three sons, and directs, by his will, that his widow shall have a life interest in his property, which is *personal*, and that *upon her death, or second marriage*, it shall be equally divided between his three sons; and that if either of his sons should die during the lifetime or widowhood of his wife, the share of the party so dying should be paid to his children, &c. The testator's sons have children, all of whom are *infants*. The widow is living, and unmarried. Can the executors *now* legally make a division of the property with the concurrence of the widow and three sons?

C.

APPOINTMENT.

A. B. devises an estate to his two daughters equally during their lives, and at their deaths to be at liberty to dispose of their shares to their husbands (for life), "child, or children; or for want of husband, child, or children, then to dispose thereof amongst their nearest relations, as they think most proper."

One of the daughters is married and has issue, the other is unmarried. Can the married daughter, under the late act, appoint exclusively to one child, and the unmarried daughter to one brother? (her brothers and sisters being her nearest relations.)

It is apprehended that something nominal *must* be bequeathed in each case to the persons standing in an equal degree of relationship. Would a shilling be sufficient to satisfy the statute, or must it be a portion, however small, of the land itself?

A COUNTRY SUBSCRIBER.

INFANT NECESSARIES.

Can an action be maintained against an infant for necessaries supplied to him, or is the proper remedy against the parent?

U. D. O.

MISCELLANEA.

ANCIENT PUNISHMENT OF ABDUCTION.

ONE John Kincaid, of Craighouse, a wild young gentleman, having his residence and property near Edinburgh, had cast his eyes upon a comely young widow, well endowed with a jointure; and, according to the rough mode of wooing not uncommon at the time, projected an attack upon her person, when she quietly resided under the roof of John Johnston, baillie of the Water of Leith.

Kincaid, supported by divers accomplices, having both arms offensive and defensive, entered the house, laid hands on the fair widow, and carried her off to the laird's tower of Craighouse, situated on the Braidhills. Little is said of Isabel Hutchison's desperation or resistance, and, considering the small distance to which the pretty dame was transported, it seems extremely dubious whether more violence was either offered or intended than just that *modicum* of it which might give her an apology for following her own inclinations. But the unlucky laird had chosen the hour of broad daylight for this gallant exploit; and, what was worse, King James and his attendants were abroad hunting in the fields through which Craighouse and his attendants conveyed his fair prize. At sight of the royal cortège, no doubt, the kidnapped widow assumed a most disconsolate appearance, and uttered her cries for help more earnestly than before; and King James, though scarcely by habit a professed slave of the fair sex, was moved to interpose his authority in her behalf. The Earl of Mar and Sir John Ramsay were despatched to beset with a sufficient retinue the ravisher's tower of Craighouse, and deliver the distressed dame Isabel Hutchison; in which they found no difficulty. But mark the end. The unfortunate laird of Craighouse, not knowing to what extremities he might be subjected for an act of violence committed almost in the royal presence, was probably easily induced to come in the king's will, and his punishment was a fine of nearly ruinous extent, being 25,000 merks, to be paid to his Highness and his treasurer; and what is diverting enough, the unfortunate culprit is peremptorily appointed to deliver to the king, or to his treasurer, over and above the fine, his brown horse, which perhaps had pleased his Grace when he had a glimpse of it at their rencounter on Braidhills.

DOMESDAY BOOKS.

Two of the most ancient books of record in the realm, called *Domesday*, made in the twentieth year of William I. surnamed the Conqueror, A.D. 1085;—one containing the counties of Essex, Norfolk, and Suffolk; and the other containing the remaining counties of England, except Durham, Cumberland, Westmoreland, and Northumberland;—are at the *Receipt* of the *Exchequer*. —*Reports of Committees of House of Commons*, (1732.) vol. i. p. 530.

EX-COMMISSIONERS.

A king's counsel, whose name need not be mentioned, the other day was walking between two of the quickly-to-be-abolished commissioners of bankrupts. "Well," said one of them, "you are very unfortunate; you are between two Ex's." "Yes," said he; "but it seems by all accounts you are not two Y's."

The Legal Observer.

VOL. II. SATURDAY, JUNE 11. 1831. No. XXXIII.

——— "Quod magis ad nos
Pertinet, et nescire malum est, agitamus."
HORAT.

THE FIRST REPORT OF THE ECCLESIASTICAL COMMISSION.

THIS Report * is deserving of attention, as well for the improvements which it suggests, as the persons who recommend them. A reform, which unites the suffrages of the learned Chief Justices of the three Courts of common law, the Archbishop of Canterbury and three leading bishops, the Judges of the Ecclesiastical Court, Dr. Lushington, and Mr. Ferguson, will hardly be objected to by the most zealous stickler for the ancient ways of the constitution.

The Report relates to the abolishing the Court of Delegates, and the transfer of its jurisdiction to the Privy Council. The Commissioners seem to have soon determined that the Court of Delegates was anomalous, and ill-suited to the purposes of justice, and that it ought to be abolished; but they seem to have had some difficulty in knowing where to transfer its jurisdiction. They do not appear to have thought upon the Privy Council: they say, they were induced to think that the constitution of the Court was essentially defective; but that they "might have found difficulty in proposing an unobjectionable substitute, if their attention had not been directed to the expediency of removing the jurisdiction to the Privy Council," but that they "had no hesitation in assenting to that proposition." This was the suggestion of the Lord Chancellor; and perhaps it is a little surprising that it should have occurred to no one of the Commissioners. Here was a "substitute" that appears sufficiently obvious, and which when proposed was immediately acceded to, which according to their own ingenuous account entirely escaped them. However, we shall let this pass, and consider the Report a little in detail.

The Court of Delegates was formed in the 25th year of Hen. 8., in lieu of the ancient form of appeal to Rome. From its earliest formation it has not given much satisfaction; and in the reign of Charles II. it was petitioned against, but without effect.

It is constituted for each separate case by a commission under the great seal. In ordinary cases the delegates are three puisne Judges, one from each Court of common law, and three or more civilians. In special cases, a fuller commission, consisting of spiritual and temporal peers, and a greater number of Judges and civilians, is issued; and if the Court is equally divided, a commission of adjuncts issues, appointing additional Judges.

The machinery for assembling the Court is, therefore, extremely cumbrous. In practice, although this is not mentioned in the Report, the nomination of the commission is, in all ordinary cases, intrusted to the Chancellor's Secretary of Commissions, who may insert any Judges or any civilians he may please. Now, although we are not prepared to say that the power has ever been abused, yet we must confess that we are opposed to intrusting this nomination into the hands of a subordinate officer of the Lord Chancellor. This circumstance appears to us, therefore, an additional reason for an alteration in the present system. The other disadvantages of the Court of Delegates are thus pointed out in the Report:—

"On this description of the Court of Delegates, we feel bound to observe, that a special commission being required in each case, some additional expense and delay are thereby incurred. The Judges in each case being different, the uniformity of decision is not so well preserved; and it not being the practice of the Court to deliver or explain the grounds of its judgments, the principles on which they are founded are not sufficiently ascertained.

"With respect to the common law Judges, notwithstanding their great learning and experience in the law of their own Courts, and the

* See the Report printed at length in the Monthly Record for May, p. 137. *et seq.*; and see vol. i. p. 251.

great attention and diligence with which they have always discharged their duties, they must occasionally, perhaps not unfrequently, rely for the law of the Ecclesiastical Courts on the civilian condelegates; who, in consequence of the principal advocates being chiefly engaged as counsel, are often junior advocates, and are thus frequently appointed to act as Judges of appeal before they have had any considerable practice or experience in their profession.

"The system of appointing advocates to act as Judges is liable, perhaps, to a still more general objection in principle; namely, that being advocates, their opinions and judgment upon the case before them may be in some degree biassed, however unintentionally, by the bearing which the decision may have upon similar causes in which they may be then engaged as counsel. The division of opinion of a court so constituted being known, becomes a ground of dissatisfaction to suitors, and encourages applications for commissions of review. Commissions of adjuncts, if necessary; and commissions of review, if granted, are attended with the expenses and delay of rehearing, and must be productive of great inconvenience.

"There being no permanent court, but each commission being limited to the particular case, no general orders and regulations can be made for expediting the course of proceeding, or establishing rules of practice."

An appeal to the Privy Council is then recommended, "being composed of Lords spiritual and temporal, the Judges in equity, the chiefs of the common law Court, the Judges of the civil law Courts, and other persons of legal education and habits."

The number of appeals also, it appears (p. 138.), is not likely to be onerous; since the whole number from both the provinces of the delegates for the last thirty years have been only ninety-five, which gives an average of little more than three in the year; and of late years they have been rather more numerous, amounting to about four a year. It is to be observed, however, that it is not unlikely that, if the present Court of Delegates be abolished, and a proper Court substituted in its place, the number of appeals would much increase; but then, as is observed in the Report, they would be more easily despatched.

A part of the proposed plan is to make "some arrangement for the attendance of Privy Councillors conversant with legal principles." This is certainly necessary, to render the tribunal effective. At present it depends entirely on the occasional assistance of the Master of the Rolls, the Vice Chancellor, or any retired Judge who may have so arranged his other engagements as to be able to attend. This is objectionable on many grounds. So long as there is no regular Judge, there will be no regular bar: business will be conducted in an irregular, not to say slovenly manner; and this objection, often urged before, may be made with additional force at a time when it is recommended that the jurisdiction of the Court should be extended.

We have long thought that there should be a complete Appellate Court for the Colonies; that it should not depend on chance or favour for a proper person to decide upon their most important interests. The arrear of appeals in the Privy Council has been, and is still, very considerable; and means should be adopted for disposing of it. We suggest that a Judge should be appointed to preside exclusively in this Court, with the assistance of the other Privy Councillors who should be summoned for the purpose.

It is said, indeed, in the Report (p. 139.), that the presiding law Lord "delivers the grounds * of his judgment, which being thus known are reported, tend to settle principles, and to establish uniformity of decision." They have, however, only been reported within the last year; and as the Judge is constantly varying, there is, in fact, very little attention paid to prior decisions.

We agree without hesitation in the recommendations of the Commissioners; but have ventured on the accompanying suggestions, which we make with great respect for the learned persons whose first Report we have thus abridged.

REMARKABLE TRIALS. No. IV.

CARNEGIE'S CASE.

A NUMEROUS party of Angus-shire country gentlemen met at a funeral in the town of Forfar, about the year 1728. James Carnegie of Finhaven was a principal person present: he was obnoxious to some of the company, who were violent Jacobites, on account of his political principles, or rather of some change he had been supposed to have made in them. An individual named Lyon, of Bugton, was also present, respected as a man of good family, but of a character so savage and rough, especially when warmed with liquor, that the gentry in the neighbourhood were accustomed to refuse him admission to their society unless he came without a sword, which was at that time accounted the distinctive mark of a man of condition. It was the wild custom of that day that much wine was consumed at funerals; and Sir David Carnegie, who acted as host, being nearest relative to the deceased, had his own share, and pressed it, as was the custom, on the other persons present. Lyon was inflamed with liquor, of which all parties had too much. He annoyed Carnegie with many cutting and brutal sarcasms, doubly

* It is to be observed, that the Report is not a model of correct composition; it is full of inaccurate expressions.

severe as applied at such a time and in such a company. The gentleman in the chair endured all with remarkable temperance, until personal aggression was added to verbal insult. When the company came into the street, the aggressor thrust Carnegie down into the kennel; from which he arose, mad with the natural passion to which he had been long wrought up. He drew his sword, exclaiming, "This is too much to be borne!" and staggered towards Lyon with mortal intentions, not to be wondered at, considering the continued and gross provocation he had received, and the condition in which he himself was. Lyon, who had no sword of his own, for the reason already mentioned, rushed towards the Earl of Strathmore, his friend and chief, and endeavoured to seize his Lordship's weapon to repel the attack of Carnegie. This nobleman was a person generally and justly esteemed, and desirous to preserve the peace on either hand: he pushed his relation aside, and threw himself between him and the gentleman so grossly offended. Unhappily, in thus interposing himself in the quarrel, he received a mortal thrust, designed by Carnegie for the person who had given him such insults, and died immediately afterwards. Such was the memorable case before the Court. The facts were stated accurately in the indictment, and the Judge pronounced them relevant to infer the crime of murder. The feelings of the jury, however, revolted against being bound by the declaration of the law laid down by the bench. They felt that the death of the Earl of Strathmore was an incident altogether unintended, and deeply lamented by the unfortunate homicide; they considered his real purpose against Lyon as excused, if not fully justified, by the grossness of Lyon's provocation; and accordingly they brought in a general verdict, that Carnegie was not guilty of the crime of murder, while they avoided giving any opinion whether the facts in the indictment were either proved or otherwise.

THE UNIVERSITY OF LONDON.— LAW CLASS.

LECTURES OF MR. THEOBALD ON THE LAW OF PRINCIPAL AND SURETY.

No. VI.

1. *Of the Remedies which the Surety has against the Principal.*

If the surety has paid the debt of his principal, he is entitled to recover the money either at law or in equity: at law, by an action of *indebitatus assumpsit*, as money paid at the request and for the use of the defendant[a], unless his principal has given him a security for his indemnification; in which case he cannot, in general, have the action of *indebitatus assumpsit*, but he must resort to the security.[b] The counter-security given by a principal to his surety is sometimes made to fall due before the original debt is payable; and in that case, it is scarcely necessary to observe, that the surety need not wait until he has paid the debt, but may resort to the security at the time stipulated. Thus, where the principal has given his surety a bond conditioned for the payment of the amount for which the surety was engaged, before it would become due and payable to the creditor, it was held, the surety might enforce the bond as soon as the condition was broken.[c] And in another case, where a bond with a similar condition was given by the debtor to his surety, it was held, the surety might set off the sum mentioned in the condition, in an action brought against him by his principal, though he had not yet paid the debt for which he was surety; the condition being broken.[d]

In *Crafts* v. *Tritton*[e], John Crafts, the brother of the plaintiff, borrowed a sum of money on two several mortgages; one of his own estate, and the other of an estate which was the joint property of himself and the plaintiff, his brother; and the plaintiff also joined John Crafts in a bond as his surety. The defendant afterwards purchased of John Crafts that estate which was John Crafts' own separate property; and instead of paying the purchase-money to the vendor, he was to pay the incumbrance off the plaintiff's estate; and in the purchase deed he covenanted with John Crafts, his vendor, to indemnify him and the plaintiff from any demand by the creditor. Had Tritton, the purchaser, paid the purchase-money as he ought, the creditor would have had no demand against the plaintiff, the surety: but he did not do so; and the plaintiff paid the money, and then brought an action of *indebitatus assumpsit* against Tritton, the purchaser. But the Court held the case to be within the rule already stated, namely, that where a counter-security is given, the surety cannot have an action of *indebitatus assumpsit*, but must resort to his security; and as the defendant had covenanted with John Crafts to indemnify him and the plaintiff, the plaintiff should either have brought an action in the name of John Crafts, or have sued John Crafts himself, for whom he was originally the surety.

The right of the surety to be reimbursed

[a] *Warrington* v. *Furbor*, 8 East, 242.

[b] *Toussaint* v. *Martinnant*, 2 Term R. 100. *Crafts* v. *Tritton*, 8 Taunt. 365. 2 T. B. Moore, 411.

[c] *Toussaint* v. *Martinnant*, see *antè*.

[d] *Penny* v. *Foy*, 8 Barn. & Cres. 11.

[e] See *antè*.

does not extend to payments made by him under an illegal engagement, to the illegality of which he was privy; and such payments he cannot recover against his principal, either as money paid at the request and for the use of his principal, or upon any counter-security. Thus, in *Bryant* v. *Christie*[f], which was an action on a bill of exchange, of which the plaintiff was the drawer and the defendant the acceptor, it appeared that the bill had been accepted by the defendant in consideration of a sum of money paid by the plaintiff to his brother, on behalf of the defendant, under the pretence of being the defendant's surety, but in reality (Lord *Ellenborough* conceived) as an inducement to the plaintiff's brother to accede to a composition which the defendant was making with his other creditors; and as Lord *Ellenborough* thought this was only a circuitous mode of securing to the plaintiff's brother the full amount of his debt, contrary to good faith with the other creditors, his Lordship would not allow the plaintiff to recover.

Formerly a surety, who had paid a debt for which his principal was engaged by bond, might obtain in equity an assignment of the bond, in order to put it in suit against the debtor, though the surety himself was a party to it.[g] And whilst that practice continued, a surety for a bond debt, upon obtaining an assignment of the bond, or payment of the debt, became a creditor of his principal of the same rank as the original creditor; that is, a specialty creditor. But since the Courts of equity have understood that payment is satisfaction of the bond at law, the surety is not allowed an assignment of it; and therefore, also, the surety now ranks in respect of his payment as a simple contract creditor.[h]

In *Bishop* v. *Church*[i], the *Lord Chancellor* ascribes the discontinuance of the practice alluded to, to "the act for the amendment of the law;" meaning, probably, the stat. 4 & 5 Anne, c. 16.

Immediately after the surety's obligation, or his liability to pay the debt, is become absolute, he may go into equity, and require his principal to exonerate him, even although the creditor has not demanded payment. This right of the surety, as to which, Mr. Theobald said he found no express adjudication, but the existence of which still was unquestionable, was recognised by the Court *arguendo* in *Lee* v. *Rook*.[k] The defendant in that case had borrowed money of Mr. Lee, who had raised it by a mortgage of the estate of Mrs. Lee, the plaintiff; and Mr. Lee being dead, Mrs. Lee brought a bill against the defendant, to compel him to pay off the mortgage-money. And the *Master of the Rolls* said, "If I borrow money on a mortgage of my estate for another, I may come into equity, *as every surety may against his principal*, to have my estate disencumbered by him."

But until the debt is due, or the debtor has made default, which is the same thing, equity will not compel him to exonerate the surety, either by requiring him to bring money into Court by way of deposit, or in any other manner. Thus, where the principal in a bond which was to become due on the 1st of July, was going to America on the 1st of June, Lord *Thurlow*, on a bill being filed by the surety, refused the writ of *ne exeat regno*, on the ground that there was no debt due. That writ also was refused to sureties who applied for it in consequence of their principal not having given them the indemnity he had promised, because at the time of their application they were under no actual liability.[l]

2. *Of the Interest which the Surety has in Securities held by the Creditor.*

The surety who has paid the debt is entitled to stand in the place of the creditor as to all securities for the debt held by the creditor, and to have the same benefit from those securities as the creditor.

One of the earliest cases which established this right was *Parsons* v. *Briddock*.[m] There the plaintiffs were bound as sureties, and had counter bonds from their principal. The creditor arrested the principal for the debt for which the plaintiffs were sureties; and the defendants became his bail, and were fixed. The creditor afterwards proceeded against the defendants, and obtained judgment. The creditor also sued the plaintiffs, the sureties; and they, having paid the debt, brought their bill for the purpose of obtaining an assignment of the judgment recovered against the defendants as the bail of their principal; and the *Lord Keeper* decreed the assignment to be made, as was prayed; and his Lordship said, that the bail stood in the place of their principal, and could not be relieved on other

[f] Stark. N. P. C. 350.

[g] *Morgan* v. *Seymour*, 1 Cha. Ca. 120. *Hole* v. *Harrison*, id. 15. *Ex p. Crisp*, 1 Atk. 135.

[h] *Gammon* v. *Stone*, 1 Ves. jun. 564. *Waffington* v. *Sparks*, 2 Ves. jun. 564. *Copes* v. *Middleton*, v. Turner, C. C. 224. *Robinson* v. *Wilson*, 2 Madd. 435.

[i] 2 Ves. 372.

[k] Moseley R. 318.

[l] *Cock* v. *Ravie*, 6 Ves. 283. See also, for a statement for the general principle, *Antrobus* v. *Davidson*, 3 Meriv. 569.

[m] 2 Vern. 608.

terms than on payment of principal, interest, and costs; and that the plaintiffs, the sureties in the original bond, were not to be contributory. So that, as Sir *William Grant* in a subsequent case observed, though the bail were themselves but sureties as between themselves and the principal debtor, yet coming in the room of the principal debtor as to the creditor, it was held, that they likewise came in the room of him as to the surety; and, consequently, the surety has the same right as the creditor, and is to stand in his place.

This right of the surety to stand in the place, as it is called, of the creditor, is further illustrated by *Wright* v. *Morley*.[n] In that case, Mr. St. Albin, the grantor of an annuity, with the consent of his wife, though she was not made a party, assigned to the grantee, as a security for the annuity, certain government stock to which his wife was entitled under the will of a former husband, and which was vested in trustees for her. The trustees refused to pay the annuity; and therefore the plaintiff, the surety, paid it; and thereupon he filed the present bill, praying a decree against the trustees, that they should repay him, and that some of the stock might be appropriated to meet future payments of the annuity. And Sir *William Grant*, with reference to these facts, and to the case of *Parsons* v. *Briddock*, said, that with regard to the payment the surety had actually made, he was entitled to stand in the place of the creditor, and to be reimbursed out of the dividends; and that he had also an equity to have the fund applied in his exoneration,—*that* being provided by the principal debtor, and made subject to the payment of the annuity.

The equity here spoken of, namely, the right of the surety to have the fund which is charged with the principal debt applied for his exoneration or indemnification, is further illustrated in *Harrison* v. *Glossop*. There, the receiver of the Opera-house had paid, to the tradesmen who supplied it, money which he ought to have paid to the bankers; and his surety advanced him the amount to pay the bankers. The receiver was afterwards discharged on his own application; and a balance being due to him, which included the sum lent by the surety, the *Lord Chancellor* thought the surety entitled to stand in the place of the receiver to the extent of his demand, and ordered him to be paid accordingly.—Standing in the place of the receiver was, in fact, standing in the place of the creditors or tradesmen; for, had they not been paid, they might have obtained payment out of the fund in Court; and, probably, it was in this point of view that the surety's claim was admitted; for it appeared, that before the surety applied, the fund had been assigned away by the receiver, so that strictly standing in his place or right would have been unproductive to the surety.

If the surety is under a disability which prevents his obtaining in a direct manner the benefit of funds or securities which have been set apart for the creditor, equity will restrain the creditor from proceeding against the surety until he has resorted to those funds or securities. Thus, in *Cottin* v. *Blane*, the plaintiff was surety to the defendants for the performance of the charterparty of a ship which was freighted for Bourdeaux. At Bourdeaux the ship was detained under an embargo; and consequently the charterparty was broken; and the defendants brought an action at law upon it against the plaintiff, the surety. The French government had declared that a reasonable indemnity should be granted for losses sustained in consequence of the embargo by neutral owners, and set aside a sum of money for that purpose. The defendants were the owners of the ship in question; they were Americans, and therefore were neutrals, and entitled to the indemnity: and the plaintiff filed his bill to discover whether they had obtained indemnity, and, if they had not, to compel them to proceed to obtain it; and an injunction was prayed for to restrain their proceeding until they should have done so; and the Court granted an injunction, upon the plaintiff bringing the money into Court.[o]

But the existence of a fund out of which the creditor might obtain payment without resorting to the surety, would not be a ground of defence at law, even though the surety could not obtain the benefit of the fund without the intervention of the creditor.

A surety to the Crown, who has paid the debt, is entitled, on the general principle, to stand in the place of the Crown in respect of securities belonging to the debtor. It is usual, also, to allow him the aid of Crown process against his principal; and also the same aid to recover contribution from a co-surety. As, however, it is now held, that sureties are entitled to stand in the place of the creditor, and have the same remedies as he would have had, only in respect of collateral securities, or secu-

[n] 11 Vesey, 12.

[o] See also *Godbolt* v. *Watts*, 2 Anstr. 543. *Wright* v. *Nutt*, 3 Bro. C. C. 326. 1 H. Bl.

rities to which he is not a party, and that the payment of the debt by the surety makes him only a simple contract creditor; it would seem to follow, that the surety ought to be allowed Crown process only in respect of such securities, (the same being by specialty,)[p] and not in all cases against the debtor. Rather, however, it were to be wished that the difference of one kind of procedure for the Crown, and another for the subject, in respect of similar rights, should be abolished, in order to contaminate a Court of justice no longer with associations and preferences which ought scarcely to be tolerated in a secretary of state's office.

(*To be continued.*)

[p] 57 G. 3. c. 117.

REVIEW.

A concise and intelligible Introduction to the Laws of England: omitting obsolete Technicalities, and containing useful Matter; calculated as a Legal Compendium for general Readers, and an elementary Work for professional Students; including the Statutes and Cases to the present Time; and noticing Lord Chancellor Brougham's Bankruptcy Bills, Lord John Russell's Reform Bills: and other intended Improvements. With an Appendix of Precedents to elucidate Principles and Practice. By a Barrister at Law, of the Inner Temple. London, 1831. John Richards.

We should hardly have noticed this work, had it not been for its Preface. The compiler there makes two quotations, the first from Dr. Watts's Logic, as follows, — "The best way to learn any science, is to begin with a regular system, or a short and plain scheme of that science, well drawn up into a narrow compass, omitting the deeper and more abstruse parts of it;" the second from Watkins's First Principles, in which he "advises the student to begin with a general outline, and recommends the Commentaries of Blackstone as a general book. 'But in the *minutiæ*,' says Mr. Watkins, 'he is frequently, very frequently, inaccurate; he should, therefore, be read with caution.'" The compiler of this work then goes on to say — "The following pages contain, it is presumed, such a system as these approved authors advise, embodying all that is useful in Blackstone (the very work recommended), omitting his obsolete and 'inaccurate *minutiæ*,' and giving in their room the improvements and alterations made in ou laws since he wrote, down to the presen time." The impression conveyed by these sentences is, that Blackstone is inaccurate and obsolete, and that the student is henceforth to look to the compiler's work as the foundation-stone of his knowledge. Now, when a man like Watkins has devoted his life to the study of one branch of the laws, and is then able to point out some inaccuracies in the part of the Commentaries in which that branch is considered, our wonder is that so few errors can be found by one so competent to point them out. But if a man comes forward, he being in no way distinguished, and boldly condemns the whole work, and offers to substitute his own production for it, we decide at once that he is a pretender unworthy either of notice or of confidence.

This was our feeling when we read the titlepage and preface of the work; but we had a further duty to perform. Instead, therefore, of throwing it aside, we examined its contents. We find that it is entirely composed from the very work which it abuses — the Commentaries of Blackstone, the portions being generally taken verbatim, and always without the slightest acknowledgment. Here and there a reference to a modern work is thrown in; but there are not two pages in the whole book, with the exception of Lord John Russell's speech at the end, that is not transcribed from the first volume of Blackstone.

There is, however, one original page, which, being the only one, we wish we could print entire, as it would satisfy the reader how far the "barrister at law" is capable of giving the alterations on the law since Blackstone. It professes to be the "explanation of abbreviations in the work." We are here told that P. W. stands for *Pierce* Williams; that D. stands for *dictum*, Digest. *Juris Civilis*; that C. means Codex Juris Civilis; that E. means either Easter Term or East's Reports; that T. R. E. means *Tempore Regis Edwardi*, &c. &c.; so that we fully agree with the compiler that the "contractions" if unexplained would be "unintelligible to the uninitiated student." If this work had professed to be what it is, a selection from Blackstone, we should have passed it by; but it being what we have shown it to be, we have thought it necessary to acquaint our readers with the fact.

DECLARATION MONEY.

We think it necessary to call the attention of our readers to the subject of declar-

ation money, as it appears there is some misapprehension on the part of several of the profession with respect to the power of the plaintiff to demand it. This probably arises from an error into which Mr. Archbold has fallen in his "King's Bench Practice," vol. i. p. 124., and from the vague ideas of an ancient practice, which are still to be found. Mr. Archbold in the above place states, that one of the instances, in which the defendant must file and not deliver his declaration, is, "where the defendant's attorney, or his clerk in his absence, refuses to pay for the copy of the declaration." Now, this is no longer the practice.

It is true that, by two rules of Court [a], it was directed, that on the delivery of a copy of the declaration, the defendant's attorney must pay for the same, after the rate of *four* pence *per* sheet, computing *seventy-two* words to a sheet, together with the stamp or king's duty; and by another rule [b] he was bound to pay four pence for the warrant of attorney, when the declaration was delivered.

So also on the delivery of the issue [c], or returning the paper-book in the King's Bench [d], the defendant was formerly obliged to pay for copies of the pleadings, except in actions by a pauper [e], or against an attorney [f] or prisoner if he appeared in person [g]; and in a *qui tam* action he paid double. [h] This was called issue-money. On the nonpayment of this money, the plaintiff might have signed judgment. [i] But by a rule of both Courts [j], "no judgment shall be signed for nonpayment of issue-money, but the same shall remain to be taxed as part of the costs in the cause." This rule has been construed to extend, in the King's Bench and Common Pleas, not only to general issues, but also to special issues, and the paper and demurrer book made up thereon. [k]

Now, it is no longer necessary to pay the declaration-money when the declaration is delivered. In *O'Neale* v. *Price* [l], where the plaintiff's attorney delivered the copy of the declaration to the defendant's attorney, he demanded a gross sum for the warrant of attorney and for the copy of the declaration, and signed judgment on the latter refusing to pay, on the rule of Court of the *5 Anne*. In the course of argument, it was admitted by the counsel, and that admission was adopted by the Court, that the plaintiff could not sign judgment for nonpayment of the declaration-money. In the year 1824, a case occurred in the King's Bench before the present Lord *Tenterden*, which is decisive on the point. Of this case, as far as we are aware, no report has been published. In it, a plaintiff tendered his declaration to the defendant, and demanded the declaration-money. The defendant refused to pay it, and the plaintiff filed it, and gave notice. The defendant then applied to the Court to set aside the declaration, on the ground that it ought to have been delivered, and not filed. The rule for setting aside the declaration was made absolute. Lord *Tenterden* observed, "that the rule with respect to issue-money must be considered as applying to all pleadings, and that declaration-money must consequently remain to be taxed as part of the costs in the cause." From these two authorities it is quite clear that Mr. Archbold is mistaken, when he states, that the nonpayment of declaration-money by the defendant's attorney or his clerk is a ground for filing instead of delivering the declaration.

It was formerly a rule in the King's Bench and Common Pleas, that the party neglecting to deliver paper-books could not be heard until he had paid for two copies of them. [m] But the rule, that no judgment should be signed for the nonpayment of the issue-money was holden to extend to the paper-books on a demurrer. [n] Consequently, if they are not paid for, the costs of them must remain to be taxed as part of the costs in the cause.

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[a] R. T. 12 W. 3. K. B. and note (a) R. T. 2 Geo. 2. K. B. See 1 Tid. Prac. 452. ed. 9.

[b] R. M. 5 Ann. Reg. 2. K. B. In the Common Pleas *four*-pence was paid for the warrant of attorney in *debt*, *trespass*, and *detinue*, and eightpence in other actions. Imp. C. P. 4th ed. 228. See 1 Tid. Pr. 452. ed. 9.

[c] R. T. 12 W. 3. 7 Mod. 51. Say. Rep. 77. *Wenham* v. *Tristram*, H. 21 Geo. 3. K. B. See 2 Tid. Pr. 726. ed. 9.

[d] See *Jones* v. *Bryant*, 5 T. R. 400.

[e] *Codron* v. *Hayman*, 5 T. R. 509.

[f] Say. Rep. 77.

[g] Cas. Pr. C. P. 35. *Everall* v. *Mason*, *a prisoner*, 2 Wils. 11.

[h] See 2 Tid. Prac. 726. *Parker*, *qui tam* v. *Macfarlan*, 5 T. R. 137.

[i] Cas. Pr. C. P. 35. 91. Barnes, 239. 243. 263. 275. 2 Blac. Rep. 1093.

[j] R. H. 35 G. 3. K. B. and C. P. 6 T. R. 218. 2 H. Black. oct. ed. 551. 1 Bos. & Pul. 292.

[k] See *Fuller* v. *Osborne*, 6 T. R. 477. R. M. 36 G. 3. K. B. And see also *Fulham* v. *Bagshaw*, 1 B. & P. 292.

[l] 4 T. R. 370. See also Imp. K. B. 10th ed. 179. (a). Imp. C. P. 7th ed. 183. (a).

[m] R. M. 17 Car. 1. K. B. R. M. 6 Geo. 2. reg. 3. C. P. And see R. E. 27 Car. 2. C. P. See also 2 Tid. Pr. 739.

[n] See *Fulham* v. *Bagshaw*, 1 B. & P. 292. *Fuller* v. *Osborne*, 6 T. R. 477.

NEW PARLIAMENT.

COMMON FORMS FOR MAIDEN MEMBERS.

To the Editor of the Legal Observer.

SIR,

UNDERSTANDING that my "common forms for Parliamentary Candidates," the advertisement of which you inserted in a recent Number*, have been found of considerable service, I am induced to make known to the public that I have lately obtained a large stock of "common forms for Maiden Members," "first step in St. Stephen's," &c. &c. Supposing, then, that, having followed my directions, the candidate is transformed into the member: I beg to assure him that, if he will only attend to my directions, and purchase my common forms, he will soon become a distinguished member of the house.

It is proper, then, he should know that he must use his utmost endeavour to become a thorough master of the parliamentary language. A smattering of it would do for the hustings, but a member must know it perfectly. Mr. Pitt, it is said, remained a year in the house before he spoke, carefully learning the language; but as, perhaps, many of the members whom I now address, will not have a year to throw away, they had better take the short cut to the knowledge, which I offer to show them. Thus, then, I address them.

In the first place, the great rule of parliamentary speaking is, to say one thing and do another. If you follow the rule, you can hardly go wrong. Thus, if you rise, and intend to make a long speech on a petition, you must begin with "I do not rise for the purpose of prolonging the present discussion, because I am of opinion that these incidental debates on petitions are extremely irregular. The proper time will come, when honourable members may address themselves to this question. I should not have risen, therefore, on this question; but"—[*Here fill in, according to the circumstances, the longest speech which you probably will make.*]

Thus, also, whenever you make or intend to make a long speech, commence with a declaration that you intend only to claim the attention of the house for a few moments; because it is clear that if you really intend to speak only for that time, the declaration is unnecessary; but if, on the contrary, you intend to speak as long as you can, you will find the declaration the most approved common form you can use.

In pursuance of this great doctrine,—to do one thing and say another,—you may say any thing you like of another member; you may attack, sneer at, and ridicule him, his profession, his political conduct, his relations, his mother, his aunt, &c.: if you only declare you don't intend to be personal, you may in fact be as personal as you please: it is merely saying it is not so, and what is that to an "honourable member?"

By the same rule, you must always commence a speech in favour of a particular measure by a general declaration against all measures of that description. Thus, if you intend to speak against any reduction of expense, you of course declare—"There is no member of this house who is so decided an opposer of all unnecessary expense as myself. I have long been determined, in every instance, that it is necessary, on all occasions, and in the smallest particular, to vote for reduction; but"—[*Here fill in a defence of the particular job which you intend to support.*] Thus also, if you support a measure likely to extend the influence of the crown, or the people, as the case may be, you must commence by a declaration against the side you support:—"Sir, I am a constant and inflexible friend to every measure tending to increase the influence of the crown [or people]; but," &c. [*Fill in the lies according to the particular measure.*] Then again, when you intend to support any measure which you think will injure the established church, you must invariably commence by saying, "I am the firm supporter of the established church of the country; and I should be the last man in the house to assent to any measure which tended in the slightest degree to put her admirable establisment in jeopardy; but"—[*Here insert your reasons for supporting the measure.*] proving that you are a complete master of the great principle of parliamentary language—the saying one thing and doing another.

This, sir, is my first lesson; but as I am of that Frenchman's opinion, who said, that if he had a whole handful of truths, he would only open a finger at a time; I shall defer my other directions to a future period.

I am, Sir,

Your most obedient servant,

X. Y. Z.

P. S.—I have addressed this letter to you, observing, through your pages, the number of lawyers who are in this parliament.

* See L. O. vol. II. p. 2.

SUPERIOR COURTS.

LORD CHANCELLOR'S COURT.

HUSBAND AND WIFE. — DIVORCE.

A divorce in a foreign country does not affect the rights acquired by a marriage in England.

In this case it appeared that a Mr. Tuite had married a widow some years ago in this country, and had gone to reside at Copenhagen, and had there become a naturalised subject of the King of Denmark. They were soon after divorced according to the Danish law, and the wife came back to England, and Mr. Tuite resided at Santa Cruz. On the death of the wife, Mr. Tuite declined, by letter, either to pay her debts or to accept of any property to which she was entitled, and recommended that the latter should be divided among her brothers and sisters in England. Previous to his death, however, he sent such an authority to England as enabled a solicitor to obtain for him letters of administration to his wife's effects. These were afterwards found to be very considerable, she being entitled to the arrears of an annuity left her by her former husband amounting to 7000*l.* The present bill was filed by the personal representative of Mr. Tuite against the relations of the wife; and the question was, whether the husband was entitled as survivor, or the divorce in Denmark and the renunciation by the husband had vested the property in the relations. The *Vice Chancellor* had decided in favour of the latter, from which decree there had been an appeal.

The *Lord Chancellor* was of opinion that the divorce in Denmark could not annul a marriage legally solemnised in England, and that the husband's marital rights remained unaffected by it; that as the renunciation had been made in ignorance of the effects of the wife, and had been subsequently revoked by the administration granted to the husband, it could not alter his right. He therefore reversed the decree of the *Vice Chancellor*, but directed the costs of all parties to be paid out of the fund in Court. — *M'Carthy* v. *De Caix*. L. C. May 9. 1831.

BEQUEST. — CONSTRUCTION.

When the meaning of a word in a will is very obscure, a person will not take under it.

This was an appeal from a decision of the *Vice Chancellor*. The testator, Nollekens, had directed that all his statues, busts, models, and works of art, should be sold by auction; and desired that the plaintiff, whom he had employed as his assistant for some years before his death, should clean and prepare them for sale. By a codicil, he afterwards left the plaintiff the blocks of marble in his yard, and all his "mod^s." and tools for carving. This codicil was in the testator's own handwriting, and was so badly written and spelt as to be nearly unintelligible. On the hearing, it had been referred to the Master to enquire and report as to what the testator meant to pass by his codicil. The Master made his report, and the *Vice Chancellor* decided that the testator's models passed to the plaintiff; and from this decision an appeal was now made to the *Lord Chancellor*.

Sir *Edward Sugden* and Mr. *Jacob* for the appellants.

Mr. *Solicitor-General* and Mr. *Sidebottom* for the respondents.

The *Lord Chancellor* was of opinion that the word "mod^s." did not mean models; and accordingly reversed the decree of the *Vice Chancellor*. *Goblett* v. *Beechey*. L. C. May 7. and 9. 1831.

ROLLS COURT.

BREACH OF TRUST. — LACHES.

If the cestui que trust has only a contingent interest, a lapse of forty years will not bar his right as between him and his trustee.

In this case Gordon had, in the year 1784, devised to certain trustees a small real estate, with directions that it should be sold as soon as possible after his decease, and converted into personalty. One of the trustees, however, named Martin, it appeared, had claims on the testator to the amount of 950*l.*, in consideration of relinquishing which, his co-trustees consented to convey to him this real estate; and it had descended to his son, and ultimately to his grandson, one of the defendants in the case. The person having a reversionary and contingent interest under the will, and who could contest this proceeding, only came of age in 1811.

Mr. *Bickersteth* and Mr. *Pemberton*, for the plaintiffs, submitted, that there could be no question as to the invalidity of this transaction between trustees, on the principle of the Court that no trustee, or person in any fiduciary situation, could purchase from himself; it was not sufficient that the transaction was proved to be fair, the interest of the *cestui que trust* could not allow it to remain.

Mr. *Tinney*, for the defendants, submitted, that as forty years had elapsed from the period of the purchase, and nearly twenty from the coming of age of the female plaintiff, the delay had been unreasonable, and the bill should therefore be dismissed.

Mr. *Cooke*, for other defendants, submitted, that at all events the defendant Martin was entitled to the purchase-money with interest, and to remuneration for money laid out in improvements on the estate during the possession of him and his predecessors.

The *Master of the Rolls* said he was aware of no case in which it was determined that a person entering into possession wrongfully was entitled to such remuneration. The case of a mortgage was different. A mortgagee entered into possession by right, and was therefore to be allowed all expenses of substantial improvements. The money laid out in the course of forty years had benefitted the possessor himself. Acting on a principle of equity, however, which went beyond the strictness of law, and considering the case somewhat analogous to charities where improper leases had been granted by trustees, he should refer it to the Master to enquire whether the saleable condition of the estate was, in respect of expenditure thereon since the sale, improved to any and what extent in pecuniary value, and how much of the increased value was to be attributed to the personal estate of Martin. With

regard to the main question, the plaintiff had not merely a reversionary, but an interest contingent on the death of her mother, who had an antecedent life interest. She therefore had not as yet acquired an interest in possession, and it could not be said that her non-assertion of her contingent right could be considered as a *laches* which barred it.—*Hennell* v. *Martin*. M. R. May 5. 1831.

VICE CHANCELLOR'S COURT.

BENEFIT SOCIETY.—INJUNCTION.

A benefit society may be dissolved by the majority of its members; and an injunction will not be granted to restrain its dissolution.

An injunction was granted to restrain the defendants, who were the president and steward of the Manningtree Benevolent Society, from receiving certain moneys arising upon mortgage. The society was established in the year 1784, and a few years afterwards, several rules and regulations were passed, and had been subsequently legalised by the magistrates at the quarter sessions. The declining state of the society induced the defendants to advertise a meeting, which subsequently took place. It was there determined to dissolve the society, by a majority of 229 members, there being only six dissenting voices. The society was accordingly dissolved, and the funds distributed among the members. Of the six who opposed the dissolution, one was since dead, two had received their portion of the fund, and there now only remained three.

Mr. *Pepys* (with whom was Mr. *Wilbraham*) was heard in support of the injunction. He said, that, under the regulations of 1793, the society could not dissolve itself so long as three members remained. It would be a great injustice, if, in friendly societies of this description, the act of the majority was binding upon the whole body; because, in that case, a number of new members would be able to dispose of the funds in whatever way they pleased, and the old members, who, perhaps, had been subscribers for a great many years, would be entirely at their mercy. In the present case, one of the plaintiffs had been a contributor forty-two years.

His Honour, in giving judgment, said, that if all the circumstances of the case had been before the Court when the application was made, the injunction would never have been granted; he should therefore dissolve it with costs.—*Waterhouse* v. *Murgatroyde*. V. C. May 5. 1831.

COURT OF KING'S BENCH.

PRACTICE COURT.

BAIL BOND.—MISNOMER.

Where a defendant has been arrested by a wrong name, the Court will direct the bail-bond to be delivered up to be cancelled, although there is strong reason to believe the defendant has removed himself out of the jurisdiction.

Archbold showed cause against a rule obtained by *Prendergast* calling on the plaintiff to show cause, why the bail-bond should not be delivered up to be cancelled, on the ground of the defendant having been arrested by the name of "Edward *alias* Edmund Littel," his name really being Eliakin. An affidavit was produced in opposition to the rule, which stated, that the defendant was in the habit of signing his name "E. Littel;" that he was an American, and had now set out for his native country, with intention, as it was suggested, to deprive the plaintiff of the means of recovering his debt.

Prendergast, *contrà*, was stopped by the Court.

Taunton J. desired that time should be given for the defendant, or his attorney, to produce an affidavit that the defendant had not sailed for America.

Prendergast, on a subsequent day in the term, said, that he had communicated with his client, but he was unable to make such an affidavit.

Taunton J. said, that although he had very strong suspicion, as to this case, yet, as the practice of the Court had been to direct the bail-bond in such cases to be delivered up to be cancelled, he would not break in on the practice, and therefore the present rule must be made absolute.

Rule absolute.—*Miller* v. *Littel*. E. T. May 2. 1831.

JUDGMENT AS IN CASE OF A NONSUIT.—INSOLVENCY.

The Court will discharge a rule for judgment as in case of a nonsuit, for not proceeding to trial, where the plaintiff did not try on the ground of the defendant's insolvency, although it does not appear when the fact of insolvency came to the plaintiff's knowledge.

On showing cause against a rule obtained by the defendant for judgment as in case of a nonsuit, for not proceeding to trial, an affidavit was produced, in which the plaintiff stated, that he had not gone to trial, on account of his having learned, that the defendant was in insolvent circumstances.

It was objected, on the part of the defendant, that the affidavit not stating, when the fact of the defendant's insolvency came to his knowledge, it was no answer to the rule.

Taunton J. Of course the plaintiff would not be so foolish as to proceed to trial, after he had learned, that the defendant had become insolvent; and, as he did not proceed to trial on that ground, as he swears, we must presume, that the fact came to his knowledge before the day of trial. The rule must be discharged.

Rule discharged.—*Anonymous*. E. T. May 2. 1831.

STAY OF PROCEEDINGS, CAUSE OF ACTION NOT EXCEEDING 40*s*.

In an action of trover, where the defendant swears the cause of action to amount to less than 40s., and the plaintiff swears it to amount to more, the Court will not stay the proceedings.

Platt showed cause, why the proceedings in an action of *trover* should not be stayed on the ground that the cause of action did not amount to 40*s*. The affidavit, on which the rule had been obtained by *Saunders*, stated, that the pro-

perty for which the action was brought consisted of a few weights, scales, and other trifling articles, not amounting in value to so much as 40*s*. In answer to this affidavit, he produced one, in which, it was sworn, that the property in question did amount to much more than 40*s*.

Taunton, J. The defendant is answered. As the plaintiff swears the cause of action to amount to more than 40*s*., the Court cannot interfere to try the merits on affidavit. The rule must be discharged, but without costs, as it appears the goods are worth only a few more shillings than the 40*s*.

Rule discharged, without costs.—*Anonymous*. E. T. May 2. 1831.

PLEADING.—ACCEPTOR.—CUSTOM OF MERCHANTS.

In an action by the drawer, against the acceptor of a bill of exchange, if it is alleged that the acceptor became liable "by the custom of merchants," those words may be struck out as surplusage.

To a declaration on a bill of exchange, in an action by the drawer against the acceptor, the defendant demurred, on the ground, that it was stated that the defendant had become liable to the plaintiff "by the custom of merchants;" whereas "the custom of merchants" applied only to actions by indorsees.

Hulme supported the demurrer, and contended that, if liable at all, the defendant must be liable at common law.

Taunton J. The words "by the custom of merchants" might be struck out as surplusage. There have been, I am sure, a hundred thousand actions against acceptors by drawers, in which those words have been introduced, and in which the drawers have recovered.

Judgment for the plaintiff.—*Anonymous*. E. T. May 4. 1831.

ATTORNEY'S LIEN. — COSTS. — PRISONER.

An attorney has no lien for his costs on the person of the defendant.

Kelly showed cause against a rule calling on the plaintiff to show cause why the defendant should not be discharged out of custody, on the ground that the plaintiff had taken a warrant of attorney from the defendant for the amount of debt and costs. The discharge had been opposed by the plaintiff's attorney, who had gone to the sheriff's officer, and warned him that he had not received his costs, and had no security for them. This, it was conceived, was a sufficient ground for not discharging him.

Steer, in support of the rule, was stopped by the Court.

Taunton J. The attorney has no lien for his costs on the body of the defendant. It is a very hard case on an attorney, but he should be more careful to whom he trusts.

Rule absolute.* — *Greenslade* v. *Kempster*. E. T. May 4. 1831.

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* See *Martin* v. *Francis*, 2 Barn. & Ald. 402. 1 Chit. 241. S. C. *Graves* v. *Eades*, 5 Taun. 429. 1 Marsh. 113. S. C. *Wythers* v. *Henley*, Cro. Jac. 379.

INFANT.—ARREST.

The Court will not try the question of infancy in a summary way, but will leave the party to his plea.

Archbold applied for a rule to show cause why the defendant should not be discharged out of custody, he having been arrested on a bill of exchange accepted by him while an infant. He was born on the 7th of December, 1809; and the bill was accepted in the month of August, 1830.

Taunton J. We cannot try the question of infancy here on affidavit. The defendant must plead it, if he will take advantage of it.

Rule refused.—*Busby* v. *Woodson*. E. T. May 4. 1831.

SERVICE OF PROCESS.

Where process has been read by a defendant, and it has not been left with him in consequence of a trick played by him on the party attempting to serve it, the service is sufficient.

Platt showed cause against a rule requiring the plaintiff to show cause why the service of a writ should not be set aside, on the ground that the writ was returnable on the 29th, and was not served till the 31st. In answer to the application, the plaintiff's attorney and clerk joined in an affidavit, in which they stated that the latter had taken the writ on the 28th to the house of the defendant; had seen him there; had given it to him; that he had looked at it; and then returning it to the clerk, had said, "Oh! it is of a wrong date, but it will do as well on Monday;" that the clerk took it away, and on Monday the 31st brought it again. What passed, on Saturday, it was contended, was a sufficient service. The defendant had taken it into his hands; had read it; and then, by a trick, had induced the attorney's clerk to take it away again.

Hutchinson, in support of the rule, submitted, that as the process had not been left with the defendant, the service was incomplete.

Taunton J. I think that as the process was read by the defendant, and the fact of its not being left with him arose from a trick played by him upon the party serving it, the rule must be discharged with costs.

Rule discharged with costs. — *Wheeler* v. *Jacobs*. E. T. May 5. 1831.

DELIVERY OF ISSUE. — SURPLUSAGE. — AMENDMENT.

Where a plaintiff strikes surplusage out of his issue, under the authority of a Judge's order, he does not thereby render the previous delivery of the issue a nullity.

Thesiger showed cause why the verdict for the plaintiff, and all subsequent proceedings since the issue had been delivered, should not be set aside, on the ground of an irregularity in the delivery of the issue. It was an action to recover the sum of 40*l*. for furniture supplied by the plaintiff to the defendant. It was tried as an undefended cause, at the last Chelmsford assizes, and a verdict found in favour of the plaintiff for the whole sum claimed. The irre-

gularity complained of, and on which the present application was made, was alleged to exist in the delivery of the issue. It was originally delivered on the 17th of February, and returned on the 18th. It was kept till the 25th; when it was again delivered at the office of the plaintiff's attorney, with notice of trial at the next Chelmsford assizes on the 7th of March indorsed upon it. On the 26th, the irregularity or error in question was pointed out; and it consisted in this,—that the defendant being an attorney, the declaration charged him as "being in the custody of the Marshal of the Marshalsea of our Lord the now King." As soon as it was shown to the plaintiff's attorney, a summons was taken out to amend. This was not attended by Mr. Wilton, nor were two subsequent ones attended. The objectionable words in question were then struck out; the issue was re-delivered on the 2d of March; and notice was given that the plaintiff would try the cause as an undefended one. The cause came on, and was tried as undefended. The objection, on which the present application was founded, was, that the issue was not in fact delivered until the 2d of March, and consequently that the defendant had not had ten clear days' notice of trial, to which he was entitled. Now, the issue was regularly delivered on the 25th of February; for the alleged objectionable words were mere surplusage, and the taking out the summonses could make no difference. Mr. Wilton had made an affidavit of merits; but every one of the statements contained in it were denied by the plaintiff.

Butt, in support of the rule, contended that the delivery of the issue on the 25th of February, with notice of trial indorsed on it, was, by the subsequent proceedings of the plaintiff, rendered a nullity; because, on the 2d of March, he obtained an order for the amendment of the issue. Whether such amendment were necessary or not, it was unnecessary here to enquire. In pursuance of this order the issue was amended, and re-delivered on the 2d of March; therefore, whatever might have been the first delivery for any particular purpose in this case, the first delivery of a good issue was on the 2d of March.

Taunton J. On the same principle, the amendment, at a trial pursuant to the 9 Geo. 4. c. 15., or at the Judge's lodgings, would be a revocation of the passing of the record: but why is the declaration incorrect, because it is stated that the defendant is in the custody of the Marshal? It is mere surplusage.

Butt. Yes; but the plaintiff has amended his issue, and re-delivered it. By his own act, he has admitted that it was imperfect.

Taunton J. He did that merely *pro majori cautelâ*. The whole of your argument proceeds on the assumption that the issue was bad, because it contains these unnecessary words. I am of opinion that the issue is not bad because it contains these words. As to the amendment having been made, probably he made the amendment without any necessity for making it; but because he has made this amendment of the issue previously delivered, we are not to say it was incorrect. Besides, the affidavit of merits is denied.

Rule discharged with costs. — *Joscelyne* v. *Ilton*. E. T. May 5. 1831.

EJECTMENT. — CHRISTIAN NAME.

Service on the tenant in possession, though his Christian name be unknown, is good.

Platt moved for judgment against the casual ejector. The service was on the parties in possession, but they had refused to give their Christian names. The question, therefore, was, whether the service on tenants, without knowing their Christian names, would suffice.

Patteson J. That will do.

Rule absolute. — *Doe* v. *Roe*. T. T. Tuesday, May 24. 1831.

EJECTMENT. — SERVICE OF DECLARATION.

Service of the declaration on the wife, at a shed where the husband carried on business, not part of the premises, but closely adjoining the premises, is sufficient.

Starkie moved for judgment against the casual ejector; the service being on the wife of the tenant in possession, in a shed where the husband carried on his business, not forming a part of the premises sought to be recovered, but closely adjoining them.

Patteson J. That, under the circumstances, is a sufficient service.

Rule absolute. — *Doe* v. *Roe*. T. T. May 24. 1831.

DEMAND OF PLEA. — SERVICE.

Sticking up the demand of plea in the King's Bench Office cannot be good service on a defendant, not an attorney.

Creswell, C., moved for a rule to show cause why the demand of plea in this case should not be served, by sticking it up in the King's Bench Office, and leaving a copy at a public house which he was in the habit of frequenting. The defendant had been arrested. The declaration was served upon him in custody. He gave a *cognovit* for the debt and costs, which, being executed without the presence of an attorney on his behalf, was void. He was set at liberty; and when it was perceived, by the party, that the *cognovit* was void, time was given to him: he kept out of the way, and there was no possibility of serving him with a demand of plea. The application, therefore, was, that he might be served by sticking up the demand in the King's Bench Office, and leaving a copy at a public house which he was in the habit of frequenting.

Patteson J. Are you aware of any such application as this having been granted by the Court?

Creswell, C. No, my Lord; I am not. But, under the peculiar circumstances of this case, I should hope your Lordship will grant a rule to show cause.

Patteson J. He is not an attorney of the Court, and therefore is not bound to be in Court. The defendant here is allowed to go where he pleases; and therefore I cannot make this good service.

Rule refused. — *Anonymous*. T. T. May 25. 1831.

EJECTMENT. — SERVICE OF DECLARATION.

Service of the declaration in ejectment on the sister-in-law on the premises, is insufficient.

On an application for judgment against the

casual ejector, it was sworn, that the declaration had been served on the sister-in-law of the tenant in possession on the premises.

Patteson J. was of opinion that the service was insufficient.

Rule refused. — *Doe* v. *Roe*. T. T. May 25. 1831.

RELIEF OF DEBTOR UNDER 48 GEO. 3. c. 123.

A party in custody for more than twelve months, for the nominal damages in an action of ejectment, is entitled to his discharge under the 48 Geo. 3. c. 123.

Evans, Joshua, applied for the discharge of an insolvent debtor, under the 48 Geo. 3. c. 123., on the ground of his having remained for the space of twelve months for a sum not exceeding 20*l*.

Addison opposed the application, on the ground that the case did not come within the meaning of the act. The applicant had been taken in execution for the nominal damages in an action of ejectment. The damages were merely nominal, and therefore below the sum of 20*l*., but the property recovered by the verdict was worth much more. She was therefore in reality in execution for more than 20*l*., and therefore not entitled to her discharge.

Patteson J. The sum for which the party is in execution, is that to which we are to look, according to the language of the act. Now, the defendant has been in custody for more than twelve months, for a sum less than 20*l*., and therefore is entitled to her discharge under the statute. — *Doe* v. *Roe*. T. T. May 25. 1831.

BAILABLE AND SERVICEABLE PROCESS.

When a plaintiff sues out serviceable process, and after a stay of proceedings consequent on an order for the delivery of particulars, he sues out bailable process, the Court will not direct the bail-bond to be delivered up to be cancelled.

Talfourd showed cause against a rule calling on the plaintiff to show cause why the bail-bond should not be delivered up to be cancelled, and the plaintiff pay the costs of the application. In this case, the plaintiff had sued out serviceable process. A summons for particulars was taken out, and an order made for them. This had the effect of staying proceedings. Two terms after the writ was taken out, he proceeded by arrest. This, it was submitted, the plaintiff was perfectly entitled to do. He cited *Bishop* v. *Powell*, 6 T. R. 616., where a plaintiff sued out common process against the defendant, and, without discontinuing, he afterwards sued out a bailable writ for the same cause, and delivered a declaration; and after that, and before plea, he obtained a side-bar rule to discontinue the first action on payment of costs. In that case Lord *Kenyon* said, "that as the first was not a bailable writ, the proceedings in this case were regular."*

* See *Olmius* v. *Delany*, 2 Str. 1216., in which the Court said that, under certain circumstances, the defendant might be held to bail in the second action before the first was discontinued, although he had been holden to bail in the first. See also Tid. Prac. p. 174. ed. 9.

Taunton J. In that case, the first action was discontinued, before the application in the second, but not before the arrest.

Platt, in support of the rule, contended, that as the proceedings were stayed until the delivery of particulars, it was a contempt of the order of the learned Judge for particulars to issue this bailable process, and arrest the defendant. It was not, therefore, so much an irregularity as a contempt of the process of the Court.

Taunton J. There is no case precisely like the present; but I have always understood the difference to be between serviceable and bailable process. The rule, that *nemo debet bis vexari pro eâdem causâ*, does not here apply, because here the first process was serviceable. The only matter which arises in this case, to bring it at all within a different principle, is that which the plaintiff mentions; namely, that there was a stay of proceedings in the first action. At the same time, I doubt very much whether the Court can exercise the jurisdiction of directing the bail-bond to be delivered up to be cancelled on filing common bail, merely on that ground. I therefore think that, on the authority of the case in 6 T. R., the justice of this case will be best satisfied by discharging this rule without costs, on the terms of the plaintiff undertaking to discontinue the first action, and delivering particulars.

Rule discharged. — *Anonymous*. E. T. April 26. 1831.

NEW RULE. — PAPER BOOKS.

Mr. Justice *Patteson* observed, that it had now been agreed among the Judges of the Court of King's Bench, that, with respect to paper books, it would not be necessary for the future to deliver books to any but the Lord Chief Justice, and the three senior *puisne* Judges sitting in the other Court. If any one of them there should require them he would obtain them from some one of the other Judges, as might be arranged between them.

June 6.

COURT OF EXCHEQUER.

EXTENT. — AGENT.

An immediate extent may issue against the goods of the agent of a Fire-office for the recovery of Crown money in his hands, although he has given a bond to the Fire-office to account for all monies received by him in his capacity of agent.

David Pollock showed cause against a rule for issuing an immediate extent on affidavits, which stated, that the defendant was the agent and collector for the County Fire-office of Kent, and in that capacity he had received certain duties on insurances; that he had become bankrupt; and that the extent had issued for the amount of the duties so received by him. He contended, that under these circumstances, there was no privity between the defendant and the Crown, and therefore that an immediate extent could not issue. He referred to the 22 Geo. 3. c. 48., by which

the head office was bound to pay and account for these duties to the Crown. This, he contended, reduced the case to a question, whether the County Fire-office should pay for the default of their agent, and receive a dividend out of his estate, or these duties be paid by Wrangham to the Crown, and nothing be left for the other creditors? Wrangham had, in fact, stated in his affidavit, that he had executed a bond to the County Fire-office, by which he undertook to account to them for these very duties. They were, therefore, bound to look to him for any default made by him. This, however, did not relieve them from their liability to the Crown under the statute. They certainly had no right to do so at the expense of the general creditors.

Shepherd, contrà, contended, that it was a new doctrine, that a person having knowingly in his hands the money of the Crown, was not to be considered as accountable. He referred to West on Extents, 303., where it was laid down, that "on an extent in chief the king may seize debts due to his debtor *ad infinitum*." The defendant might be answerable both to the insurance office on his bond for the money due, and to the Crown for the duties in his hands.

Lord *Lyndhurst* C. B. The defendant has received the money of the Crown. Wherever money is received on account of the Crown, it belongs to the Crown; and the situation of the defendant, as agent to the County Fire-office, cannot interfere with the prerogatives of the Crown.

Bayley B. The question here is, whether the Crown may treat Wrangham as an immediate debtor, or not. Now, but for his wrongful act in disposing of the money he had received as duties, it would have been forthcoming to the Crown. The estate distributable among the creditors is not to be increased by the amount so wrongfully received by Wrangham. I do not see why the assignees of Wrangham, on whose part this application is made, should stand in a better situation than himself. Now, suppose the County Fire-office had become bankrupt, would not Wrangham have been answerable to the crown? If so, the situation of himself and assignees cannot be altered with respect to these duties.

Garrow B. and *Bolland* B. concurred.

Rule absolute for an immediate extent.* *R.* v. *Wrangham*. E. T. May 2. 1831.

* An immediate extent is one which issues without the intervention of a *scire facias*. As soon as the Crown debt is recorded, the Crown may proceed either by *scire facias* (in which case an extent is the *ultimate* process of execution), which is the course if the Crown debt be not in danger of being lost; or by *immediate* extent, on affidavit that the Crown debt is in danger. The expression "immediate extent" is sometimes used as contradistinguished from an extent in aid. But, that "immediate extent" is most properly used as contradistinguished from an extent issuing through the medium of a *scire facias*, appears from the 6 Rule, 15 Car., which orders, "that no *immediate* process of extent be awarded for *debts in aid*, but in cases of extremity," &c. See Par-; 281, 282.; *R.* v. *Gibbons*, Bunb. 24.; *R.* v. *Taylor*, ib. 127.; *R.* v. *Enderupp*, ib. 154.; *R.* v. *Bishop of Exeter*, MS. App.; *R.* v. *Moseley*, MS. App.; Gilbert's Excheq. 168.

With respect to this mode of proceeding by immediate extent, it is to be observed, that the stat. 33 Hen. 8. gives the Court of Exchequer power to issue the *capias, extendi facias*, &c., *if need shall require;* or any of them, as unto it shall be thought, by its *discretion*, expedient for the *speedy* recovery of the king's debts.

The immediate *extendi facias*, therefore, is only issued when the Court, *in its discretion*, thinks that *need does* require; the exercise of its discretion is shown by the *fiat*, which the Court, or, according to modern practice, any one of the Barons, grants; and the *need* is shown by the affidavit o the insolvency of the defendant, and consequent danger of the debt; at the foot of which affidavit the *fiat* is written by the Baron. See West on Extents, 18.

It may not perhaps be unimportant here to point out the distinction between "an extent in chief" and "an extent in aid." "An extent in chief" is one which issues in the name of the Crown, and in which the Crown is the *real* plaintiff: an "extent in aid" is one which issues in the name of the Crown, but in which the Crown is only the *nominal* plaintiff, and a subject is the *real* plaintiff. A mistake is sometimes made in calling an extent in aid an extent issuing for the benefit of the Crown, but which does not issue against the king's debtor, but against the debtor of the king's debtor; whereas any extent in which the Crown is the REAL plaintiff, no matter how distant the party sued may be, as a debtor from the Crown's own debtor, is properly "an extent in chief." See West on Extents, pp. 12. 14. 303.

BANKRUPT. — PETITIONING CREDITOR'S DEBT. — EVIDENCE. — LOST BILL OF EXCHANGE.

Where notice to dispute a commission of bankrupt has been given, secondary evidence of a bill of exchange, forming the petitioning creditor's debt, but which has been lost since the commission issued, is admissible.

This was an action by the assignees of a bankrupt, for the recovery of a certain sum due to the bankrupt. Notice to dispute the commission was given. In proving the petitioning creditor's debt, it appeared that it consisted of two bills of exchange and a shop debt. One of the bills of exchange, without which the amount of debt required by law to support the commission did not exist, it appeared, had been lost since the commission issued. After proof that search had been made for the bill, and that it could not be found, secondary evidence of its contents was tendered and received. A rule *nisi* for a new trial was obtained by *Biggs Andrews*, on the ground that this secondary evidence had been improperly received.

Kelly showed cause against the rule, and contended, it was enough to show that a good petitioning creditor's debt existed at the time of issuing the commission, and that it was unnecessary to prove the existence of such a debt at the time of the trial. If a petitioning creditor's debt were good at the time of issuing the com-

mission, no subsequent event could make it a bad one. That was the principle recognised in the case of *Ex parte Douthat*, 4 B. & A. 67. The effect of a different rule must be to make the commissioners, the petitioning creditors, the messenger, and every person acting under it, trespassers *ab initio*. This would require the commissioners, in all future cases, to exercise a degree of foresight almost impossible. The only mode of overturning a commission so issued was by *supersedeas*.

Gunning and *Palmer* followed on the same side.

Andrews, *contrà*, cited *Pierson* v. *Hutchinson*, 2 Camp. 211., to show that an action at law cannot be maintained against the acceptor of a bill of exchange, which was lost after being indorsed, even though an indemnity was tendered to the defendant. The same principle was laid down by Lord *Tenterden* C. J. in the case of *Hansard* v. *Robinson*, 7 B. & C. 93. He should therefore rely on the doctrines laid down by Mr. Justice *Buller*, in the case of *Abbott* v. *Thurle*, Douglas, 206. His Lordship said, "It is an established rule, that assignees must prove the petitioning creditor's debt by the same evidence which must have been produced in an action against the bankrupt." On these authorities, he submitted, that the assignees having failed to produce the bill, or to show that it was destroyed, they had failed to prove a good petitioning creditor's debt.

Lord *Lyndhurst* C. B. If there was originally a good commission, it must be still a good commission, notwithstanding the bill has been lost since. The only question is, if there was a good debt proveable by legal evidence at the time the commission issued; for the commissioners can only act upon the same evidence as is receivable in a Court of law. But they act upon circumstances, which may be subsequently varied; and therefore it is enough that the petitioning creditor's debt is established before them by legal evidence.

Bayley B. This distinction does not appear to have been taken on the part of the defendant, that there may be a legal debt which is not recoverable at law; for, if a party sues on a lost bill of exchange, he cannot recover upon the bill, because the defendant has a right either to have the bill delivered up at the time of payment, or to receive an adequate indemnity. Such an indemnity cannot be given in a Court of law; and therefore the party to whom such legal debt is due must go into equity, which can require such an indemnity. That circumstances may make this rule different from the case of *Ex parte Douthat*, in 4 B. & A. 67., is true; for there the bill could not be used against the bankrupt afterwards, by getting into the hands of a *bonâ fide* holder. It is very true, that if this bill were to come into the hands of a *bonâ fide* holder, he need not prove under the commission; but he might sue the bankrupt. That is a hardship, from which the bankrupt could relieve himself only by applying to supersede the commission, unless the petitioning creditor gave him an indemnity. He would not, however, at all events, be entitled to supersede the commission, if there would still be a good debt recoverable in a Court of equity.

Garrow B. and *Bolland* B. concurred.

Rule discharged. — *Pooley* v. ———. E. T. May 3. 1831.

ATTACHMENT FOR NON-PERFORMANCE OF AN AWARD.

The Court will grant a rule nisi *for an attachment for the non-performance of an award thirty-six years old.*

Follett applied for an attachment for the non-performance of an award which had been made in the year 1795. The reason for not taking proceedings at an earlier period, was, that the defendant had been abroad ever since the making of the award.

Taunton J. You may take your rule *nisi*.

Rule *nisi* granted. — *Anonymous*. E. T. May 5. 1831.

EXCHEQUER SITTINGS

After Trinity Term, 1831, *in London and Middlesex.*

Tuesday, 14th June	Revenue and Common Jury Causes in Middlesex.
Wednesday, 15th June	Common Juries in London.
Thursday, 16th June	Special Juries in Middlesex.
Friday, 17th June	Special Juries and Common Juries in Middlesex.
Saturday, 18th June	Common Juries in Middlesex.
Monday, 20th June	Adjournment Day in London. (Common Juries.)
Tuesday, 21st June	London Special Juries in and after Trinity Term.
Wednesday, 22d June	London Special Juries and Causes.

MINOR CORRESPONDENCE.

ANSWERS TO QUERIES.

LEGACY. — HUSBAND AND WIFE.

It is singular, neither of your correspondents on this subject has referred to the case of *Honner* v. *Morton*, 3 Russ. 65., which has settled this point, or rather shows that *this* point has been long settled. There can be no doubt the assignment would be good against the husband; but to complete the legal title, an administration must be granted: and if the husband refused to administer, a Court of equity would probably compel him; or perhaps the Ecclesiastical Court would grant administration at once to the assignee, on the husband's refusal.

H. F. G.

MISNOMER.

It is clear, from the case of *Arbouin* v. *Willoughby*, 1 Marsh. R. 477., that if a defendant has more than one Christian name, he must be sued by all; and from the case of *Lake* v. *Silk*, 3 Bing. 296., that he cannot be sued by initial of either.

W. H. M.

In *Arbouin* v. *Willoughby*, 1 Marsh. 477., proceedings were set aside, on the ground that the defendant, having two Christian names, was sued by only one of them. But where defendant in his dealings with the plaintiff had omitted one of his Christian names, he was not allowed to make the same omission a ground for setting aside the proceedings. *Walker* v. *Willoughby*, 2 Marsh. 230. S. C. 6 Taunt. 530. If the process be serviceable, the Court will not interfere on motion, but leave defendant to plead in abatement.—*Rolph* v. *Peckham*, 6 B. & C. 164.

I do not apprehend that the plea in abatement would have the effect of bringing the debt again within the statute of limitations; it being sufficient if the action be *actually*, though irregularly, commenced within the period. — *Beardmore* v. *Rattenbury*, 1 D. & R. 27.

F. G.

FORGING UNSTAMPED RECEIPTS.

I think the mere fact of the receipts being unstamped would be no bar to a person being indicted for forgery; as by the 11 Geo. 4. and 1 Wm. 4. c. 66. § 10. it is enacted, "that if any person shall forge or alter any acquittance or receipt, either for money or goods, *with intent to defraud any person whatsoever*, every such offender shall be guilty of felony, and punished accordingly."

A. F. C.

QUERIES.

DEBTS OF FEME COVERT.

A married woman, having her property settled upon herself, with power to dispose of the same by will, employs an attorney to draw her will; and desires that her funeral and testamentary expenses, and her *just debts*, may be first paid. Are the executors liable for the attorney's bill, or for any expenses attending her last illness? or is the husband answerable for the same?

E. P.

INSOLVENCY.

A. sues *B.* in the Palace Court; on the return of the writ, *B.* admits his inability to pay, but delivers to *A.* a horse for sale, on the understanding that the proceeds of the sale may be applied by *A.* in liquidation of his debt: shortly after such delivery *B.* goes to prison, and petitions the Court for Relief of Insolvent Debtors. This being a payment within three months, can the assignee of the estate recover the proceeds of the sale of the horse? See 32 Geo. 4. c. 57.; also *Herbert* and *Wilcox*, 6 Bing. 205.

REMEDY AGAINST THE HUNDRED FOR BROKEN WINDOWS.

Can a person recover against the county, compensation for damages sustained by the demolition of windows, &c., by a mob riotously assembled, as on the occasion of the recent illumination, without proving it was done with a felonious intent? The act 7 & 8 Geo. 4. c. 31., for amending the laws relative to remedies against hundreds, bears that construction; and I understand the Court of King's Bench has so determined; but where the decision is to be found I have not been able to ascertain.

U. D. O.

MISCELLANEA.

MAGNA CHARTA.

THERE are two originals of the *Magna Charta* granted by King John, in the Cottonian Library, from one of which the seal has long since been lost, or plucked off; and that which has the seal still remaining affixed to it, was greatly shrivelled up, the letters being contracted, part of the wax of the seal melted, and one or two words quite destroyed, and was so much damaged by the fire, that there is reason to fear that some parts of it will not much longer continue legible. Mr. *Speaker* was pleased to direct that a copy should be exactly taken from it upon parchment in a fair and durable hand; and that the words, or parts of words, which were eaten out by the fire, should be supplied in red letters from the other original; and then procured it to be compared with both originals, by several keepers of records and others versed in such writings, to see that the copy agreed exactly with the said originals, *i. e.* each part of the copy with its respective original, and to testify such agreement and correspondence of the originals and transcript upon the back of the transcript; which was done accordingly, December 18. (1731-2). And an inscription was then also wrote upon the back of the said transcript, mentioning the fire and the state the two originals of the Magna Charta were in at the time of making the said transcript, which is to remain in the library *ad perpetuam rei memoriam.*— *Reports of Committees of House of Commons*, (1732), vol. i. p. 450. *Appendix* A. *Narrative of the Fire at Ashburnham House.*

LORD MANSFIELD AND SIR JOSEPH JEKYLL.

When Sir Joseph Jekyll died, he left his fortune to pay the national debt. "Sir," said Lord Mansfield, "Sir Joseph was a good man and a good lawyer, but his bequest was a very foolish one: he might as well have attempted to stop the middle arch of Blackfriars Bridge with his full bottomed wig!"

THE LAW OF LIBEL.

A state prosecution in the reign of Queen Anne was managed in a different manner from one in the present time. Swift, in his Journal to Stella, says, "I forgot to tell you that the printer told me yesterday, that Morphew the publisher was sent for by the Lord Chief Justice, who was a manager against Sacheverell. He showed him two or three papers and pamphlets; amongst the rest, mine of 'The Conduct of the Allies;' threatened him, asked who was the author, and has bound him over to appear next term."

The Legal Observer.

Vol. II. SATURDAY, JUNE 18. 1831. No. XXXIV.

——— "Quod magis ad nos
Pertinet, et nescire malum est, agitamus."
HORAT.

IMPRISONMENT FOR DEBT.

CONSIDERATIONS AGAINST ITS ABOLITION.

THE subject of imprisonment for debt is now exciting more attention than ever in various parts of the world. In America, in particular, it is undergoing very general discussion, with a view to the amelioration if not the abolition, of the practice. It is singular, however, that our transatlantic brethren should in this respect far exceed the severity of our code. If they have outstripped the parent state in some of the measures of political and legal reform, they appear far behind us in the law in question.

It will be recollected that many years ago the amount for which an arrest could be made in England was extended (except on bills of exchange and notes) from 10*l.* to 15*l.*, and recently the limit in all cases has been enlarged to 20*l.**

In some of the states of America, debtors are imprisoned for so small a sum as a single dollar; in others it is limited to five dollars, in another (New Hampshire) to thirteen, and in Maryland to thirty. In two only has it been abolished entirely, namely, in Kentucky and Ohio.† The number of imprisonments for debt in America is consequently very great. In Massachusetts and Maryland they amount *annually* to 3000 each; in Pennsylvania to 7000; and in New York to 10,000.‡

The long series of questions which have been sent by the common law commissioners to the members of the profession, and which we have inserted in previous numbers§, render it necessary that we should seriously enter on the examination of the subject.

The question divides itself into the following considerations, applying to imprisonment in general, and the *minimum* for which it should be permitted:—

1. In cases where fraud or misconduct is imputed, either at the time of contracting the debt or subsequently.
2. Where the debt is of large amount.
3. Of small amount.

On this occasion we intend principally to discuss the general question, and not to enter on the consideration of the particular sum for which the arrest should be continued.

1. No one can be wild enough to contend that imprisonment should be altogether abolished. In cases where the debt has been fraudulently contracted, or where there has been a subsequent concealment of property, or a wasteful disposal of it in profligacy or gambling, or where the debtor has made preparations to abscond — in all these cases, we presume, it will be conceded that the culprit ought to be imprisoned.

In many instances, however, it may be a subject of dispute whether fraud or malversation has been committed,—whether concealment took place, or flight be intended; and then the question arises, "What is to be done whilst the investigation proceeds?" And here, it seems, there is no other safe course than holding the defendant to bail to meet the charge. If he be of good character, he will probably find no difficulty in obtaining sureties: if otherwise, the presumption of guilt is increased, and he must abide the determination of a competent tribunal.

If, however, any extensive change should take place, and the debtor be entitled to an

* It is worthy of notice, that the law which permitted an arrest for 10*l.* on a note or bill, and prevented it on other debts, clearly recognised the importance of consulting the interests of the commercial classes, and enforcing by the wholesome fear, of confinement the punctual discharge of debts of small amount.

† North American Review for April, 1831.

‡ Ibid.

§ See *ante*, pp. 25. and 73.

exemption from arrest, or an earlier discharge than he now obtains, he must submit to some new rules for the protection of the creditor; for we presume the interest of the latter is worthy of some consideration, as well as that of the former.

Thus the debtor who claims an exemption from the discharge of his engagements should prove the fairness of his dealings, and should not be entitled to relief unless he can render a satisfactory account of the disposal of his property, the cause of his failure and every suspicious circumstance in his affairs. The expense and burthen of proof should not rest on the shoulders of the creditor. At all events, if not otherwise discharged, the estate should bear the expense of the investigation; for an individual creditor, unless his debt were large, and he expected an adequate dividend for his interference, would not incur the trouble and expense of an examination, and all the enquiries necessary to make it effectual.

2. As to debts of large amount, it is said that the power of depriving the subject of his liberty ought to be vested only in the hands of a judge, as in the case of trover, and not in the aggrieved party, who may act from caprice or anger.

This is a plausible but fallacious argument. The evil is greatly exaggerated, and the proposed remedy we believe to be impracticable. First, we assert that the instances are exceedingly rare in which the honest debtor is visited with severity. We believe that fraud is encouraged by the too great leniency which is exercised even in cases of a culpable nature. And, after all, how is the judge to form his decision, except on the oath of the accusing party? It is impracticable to enter on the trial of each case in the first instance. Indeed, we are not aware of the nature of the investigation which is recommended as a substitute for the present practice. Is it to be in the nature of a hearing before a police magistrate, the parties brought to the bar on summons or warrant? We doubt the practicability of such a course of proceeding; and even its attempt would render it necessary to appoint more new judges, who, of course, must be attended by counsel and attorneys; and all this in the preliminary stage of the cause.

On the other hand, if the judge is to decide on *ex parte affidavits*, we question whether the "poor debtors" will be benefited; for we believe that in those cases in which they are held to bail by respectable persons, there has generally been some misrepresentation in obtaining credit, or some misconduct of the debtor subsequently; and therefore this class of plaintiffs would have no hesitation in making the necessary affidavits, and they are sufficiently controlled in the exercise of the power they possess by the risk of losing their costs.

As to the next class of litigants, who it is alleged abuse the process of the court, and are guilty of oppression — they confessedly will not be much restrained in bringing forward charges of fraud against their debtors, although they may be equally culpable themselves.

We, therefore, exceedingly question whether the proposed alteration would really relieve in any perceptible degree the condition of the debtor, whilst it would assuredly increase the expense, by creating a species of court, like those in France of "the first instance," where the matter would be decided without a jury.

We admit that the duration of the imprisonment is a fair question for consideration; and might, in the majority of cases, be regulated by the amount of the debt, and the circumstances under which it was contracted.

Compulsory delivery of property, however, should be strictly provided after a reasonable interval, to allow of an arrangement with the creditors; for otherwise the effects are either wasted, or unfairly distributed amongst a few particular creditors.

The number of persons discharged without paying their debts, it is said, is much larger than the number of those who pay them. But the question still is, whether those who pay would have done so if no arrest had taken place; or whether the amount received is greater than it would be if the practice were altered. We think a total change would not be beneficial: and this brings us to the next point, namely,

3. The arrest for sums of small amount, with regard to which the first important point to consider is, whether the diminution of credit for small sums of money will be advantageous to the community in general? It cannot, we think, be denied, that the proposed alteration would render persons more cautious regarding the credit they allowed. It may be true, that, ultimately, this would be beneficial to a considerable extent, as it would render trade more certain: but then it must be remembered, that, if there were fewer losses, there would also be less gains; and that, though there might be a diminution of individual insolvencies, there would be a still greater decrease of national wealth.

If the new views on this subject were proposed in a country in which there was no national debt, no artificial and complicated state of public credit, and no conflict

regarding free trade, the abstract reasoning which is applied to the question might be irresistible. But we conceive it will be somewhat difficult for the legislature to act on the principle of restraining credit, whilst it continues to sanction public loans, and to uphold a system of finance which has itself altered, in a great degree, the character of the British trader.

We have heard it urged, that the privilege from arrest of members of parliament has not been found injurious; and that the like exemption, which is granted, for the sake of their clients, to serjeants and attorneys at law, is not attended with any ill consequences.

It is some commendation of the members of the senate and these legal practitioners, that, according to this statement, they generally pay their debts, and do not abuse the privilege with which they are invested. But, in addition to the fact of these classes of society being, of course, generally respectable, it may be observed, that their station, in a great degree, operates as a check on dishonourable conduct. The apprehension of the disgrace of being sued, may be to one man as efficacious as that of imprisonment to another. The point for which we contend is, that there should be some speedy and effective mode of stimulating the debtor, whether indolent and reckless, or profligate and fraudulent, to exert every means in his power to discharge his engagements; and we speak from no small experience of the necessity of enforcing this principle. We are quite willing to allow that there is more folly than misconduct, and more negligence than fraud, in the dealings amongst men; but it is quite as necessary to teach prudence and industry as to repress villany and crime; and, in fact, it ought to be considered as no small ground of blame when a man does not pay his just debts. The evil consequences are frequently very serious; for not only the immediate creditor, but all his connections, are affected by the transaction.

It seems to be supposed, (contrary to every day's experience,) that all those who do not pay their debts are *unable* to do so, and that there is no class of debtors who are *unwilling* to pay the demands upon them. The whole of the sympathy of the abolitionists is engrossed by the consideration of the supposed hardships of "honest debtors." We believe the number of these to be very small, and that the larger part of the prisoners well deserve their fate, either for their fraud or their misconduct.

The experience of every man of business will bear us out in asserting, that there are many persons who selfishly retain a large part of their income, (which ought to be applied to discharge debts of the first necessity,) in order to expend it upon luxuries and indulgences which can only be procured by immediate payment,—such as the expenses of the tavern, the playhouse, excursions of pleasure, and so forth; and nothing but the fear of a gaol will counteract these profligate tendencies.

We think that English creditors may very safely be trusted with the power which they possess; and, in truth, the persons who obtain credit know well enough, that the risk they incur of being confined if their engagements are not fulfilled, is not one of so formidable a nature as to deter them from encountering it.

An outcry will of course be raised against those who, as lawyers, are disposed to question the policy of abolishing imprisonment. It will be said, they resist the improvement because their emoluments will be diminished. This clamour ought to be despised. Lawyers, like all other classes, have a right to take care of their just interests, and to take all due means to promote them without injury to the community; but in the present instance we are persuaded that it would highly conduce to the profit of those practitioners who would lend themselves to the delusion, if all the proposed measures of law reform were at once carried into operation; for certain it is, that litigation would be increased fourfold. If we had no other object in view than the *pecuniary interests* of our brethren, in all branches of the profession, we should cheer on every wild and ill-considered plan of reform; but we are persuaded that the true interests of the profession are identified with those of the public. The profession, to perform its duty, must be not only respectable, but *respected*, and it never can be so if substantial justice be not generally obtained.

R. R.

LEGAL ANTIQUITIES.

No. I.

THE OLD ENGLISH BARON, AND THE FEUDAL SYSTEM—TENURE BY BARONY, AND THE DIGNITY EXPLAINED—THE RESERVATION OF FEUDAL TITLES OF HONOUR—THE BERKLEY BARONY—SPEECH OF THE LORD CHANCELLOR.

To the Editor of the Legal Observer.

SIR,

I BEG leave to send you the following Essay on the Baronial Dignity, for the purpose of

communicating to such of your intelligent readers as are interested in antiquarian as well as legal subjects, an abridgment of the law, ancient and modern, on the elementary principle of the feudal system, from which the dignity takes its rise. The Anglo-Norman law, on knight service and hereditary fiefs, which I have introduced, will supply an omission in the Commentaries of Sir William Blackstone, vol. ii. p. 50., of a passage, from which the constitution of England derived its origin and principal foundation.

The important provision in the charter of King John for dividing the *communia consilia regni* into two Houses of Parliament, is entirely omitted by the learned commentator; and Mr. Christian, in note 3. vol. i. p. 399., quotes a part of it, with the following interpretation: —

"*It does not appear that it ever was ascertained what constituted a greater Baron*, and it probably was left to the King's discretion to determine; *and no great inconvenience could have resulted from its remaining indefinite;* for those who had not the honour of the King's letter would have, what in effect was equivalent, *a general summons from the sheriff.*"

To enable your readers to understand the feudal creation of a baron of the realm of the first rank (for the subsequent editions of the Commentaries still leave the subject in obscurity), I have given a definition of the tenure by barony, which, at the same time, may obviate any misrepresentation when claims to dignities arise; and I have shown that the Majores Barones, who had not the honour of the king's letter, under the provision of Magna Charta, were never summoned, and that the Barones Minores only were summoned by the sheriffs.

It is not my intention to depreciate the literary attainments of any; but, on the other hand, if possible, to diffuse new light with due deference to the productions of all; still I may, perhaps, be permitted to observe, as "*facile est inventis addere,*" that even in the best publications deficiencies may sometimes be discerned.

I am, Sir,
Your very obedient Servant,
London, June 6. 1831. HENRY W. WHATTON.

ON THE DIGNITY OF A BARON OF ENGLAND.

The appellation of *Baron* appears to be derived from Βαρος, or the Latin word, *Baro*, in the pure age of that language signifying *Robur belli*, which Bracton introduces in this passage: — "Sunt alii potentes sub rege, qui dicuntur *Barones;* hoc est, robur belli;" hence, those who fought next the king in battle were called Barones. In Cicero the name may be read in the singular and plural number. Henry of Huntingdon gives Adelwald, under King Edward, son of Alfred, the addition of *Baro Regis;* and in Domesday Book, under Thorp, in Suffolk, may be found this sentence: —

"Hanc tra inuadiauit Abbas [S. Edm.] et Barones Regis, scilicet W. epm. Engelricu, 7 Rad. Stalra pro cs."

Also a singular passage, under Henret in Berkshire, illustrative, in some degree, of ancient habits: —

"Henric' ten. ibi I. hid. quæ fuerat in firma regis. Godricus tenuit. Aluric' de Tacehā dicit se uidisse breuem regis qđ. eā dederit feminæ Godrici in dono, *eo q'd nutriebat canes suos.* Sed nemo ē in Hund. qui breuem uiderit p'ter Aluricum."

The king generally rewarded his chieftains, for their valour and military discipline, with fiefs, which they held of him as his immediate tenants; whilst others yielded up eligible tracts of their domains to receive them back as noble fees; thus in peace or war inequality of rank constituted an important feature in the structure of society, and thenceforward contributed both to polish the people and to refine their pleasures and amusements. A classic illustration of the feudal times may be drawn by comparison with those of ancient Greece, from the poems of Homer, which some conceive were intended to expose the mischiefs arising from the political state of that distinguished nation; for example — the Iliad will represent the dissensions generally originating among independent chiefs; and the Odyssey, the insurrectionary spirit of the nobles and vassals, when unrestrained by the presence and magnanimity of their sovereign.

The feudal constitution, useful and honourable in principle, was introduced about the year 1070 into England: it was weak at the commencement of King William's reign; but after fiefs became hereditary, and knight service was associated with the system, and the light of history began to dawn, the high and disinterested notions of chivalry were effectually regenerated, and a regular and powerful form of government was gradually established.

"At the court of every prince, count, or baron, jousts and tournaments * became the

* Tournaments were substituted instead of the naked spectacles of the Greeks. The Lists were adorned with a splendid assemblage of the fair; and from the queen of the tournament, generally a beautiful and high-born damsel, the

favourite amusements, and presented a living image, both in real and mimic war. In the expeditions to the neighbouring kingdoms, or the Holy Land, their followers were measured by the power, wealth, and fame of each independent chieftain. They were distinguished by his banner, his armorial coat, and cry of war; and the most ancient families in Europe must seek in these achievements the origin and proof of their nobility."†

The law of King William on knight service and hereditary fiefs:—

"Statuimus etiam et firmiter præcipimus ut omnes comites, et barones, et milites, et servientes, et universi liberi homines totius regni nostri prædicti, habeant et teneant se semper bene *in armis et in equis*, ut decet et oportet, et quod sint semper prompti et bene parati ad *servitium suum integrum* nobis explendum, et peragendum, cum semper opus adfuerit, secundum quod nobis debent *de feodis et tenementis* suis de jure facere, et sicut illis statuimus per *commune consilium* totius regni nostri prædicti, et dedimus et concessimus in *feodo jure hæreditario*."—LL. Guill. c. 58.

The Qualification of a Baron.—"Abbas Wulfricus habuit fratrem, Guthmundum vocabulo; cui filiam præpotentis viri, in matrimonium conjungi paraverat: sed, quoniam ille xl. bidarum terræ dominium minus obtineret; licet nobilis esset, inter proceres tunc nuncupari non potuit."—Reg. Elien. in Bibl. Bodl. f. 80.

The Relief.—"De relevio baronis: IV. Equi cum sellis et frænis ornati, et Loricæ II. et II. Galeæ, et Scuta II. et II. Hastæ, et II. Enses; et alii cæteri II. unus Veredus et unus Palfridus cum fræno et capistro."

DEFINITION OF THE TENURE BY BARONY.

The baronial dignity was created in England by the admission of the intended baron to the King's Great Court, and by a royal charter or gift of a castle, manor, or territory, with jurisdiction, rights or privileges; or by the surrender of the like to the king to receive it back as a noble fief; to hold immediately of him, as of his crown, in fee farm, for a knight's fee, or more, as tenant in capite; whereupon, owing suit and service to the king, he took the *juramentum fidelitatis*, did homage, and was saluted Baron.

This creation, in itself, immediately ennobled the blood, and conferred the dignity of a Baron of the Realm, *baro regis*, in fee. The barons so created were numerous; and by them the standard of freedom was unfurled, and the bulwark of British liberty established, at Runnamede. On that celebrated spot, in 1215, *Magna Charta* was signed by King John, which limited the relief in future for the heir of a baron, "*plene etatis*," to 100 marks; and laid the foundation for dividing the *communia consilia regni*, or legislative body, into distinct assemblies, by this important provision:—

"Et ad habendum commune consilium regni de auxilio assidendo, aliter quam in tribus casis prædictis, vel de scutagio assidendo, summoniri faciemus archiepiscopos, episcopos, abbates, comites et majores barones, sigillatim per literas nostras. Et preterea faciemus summoniri in generali per vicecomites et ballivos nostros, omnes illos qui de nobis tenent in capite ‡ ad certum diem; scilicet ad terminum quadraginta dierum ad minus; et ad certum locum; et in omnibus literis illis summonitionis, causam summonitionis exprimemus; et sic facta summonitione negotium ad diem assignatum procedat, secundum consilium illorum qui presentes fuerint, quamvis non omnes summoniti venerint."

The barons of England were enumerated by King Henry III. at 240. "Nominavit," says Matthew Paris, "dominus Rex et numeravit omnes Angliæ quarum ei occurrit memoria, baronias, invenitq; ducentas et quinquaginta." A sitting in the *communia consilia regni*, or parliament, at any period, even subsequently to that reign, was not a constituent part in the creation of a baron by tenure, the dignity being completely established without it. Attendance in parliament, although a service, was a right annexed to the dignity, and often suspended by the crown: it was a burthen rather than an honour, and did not assimilate with the chivalrous spirit of the age; for some of the barons had no summons, for political reasons, and others never required any, and yet they ranked in power and distinction with the principal nobles of their time. The ordinance of the 48th of Hen. III. will illustrate the former remark:—

"Statuit et ordinavit quod omnes illi comites

conqueror received the prize. About the year 1149, these diversions were celebrated with great magnificence, in the tilt-yard, near St. James's, and in the castles of the principal nobility. The following account of a joust, in 1397, is rather curious:—"When the trial of arms was about to take place between the dukes of Hereford and Norfolk, at Coventry; the former nobleman lodged at Baginton castle, whence he issued on the morning of the projected contest, armed at all points, and mounted upon his white courser, barded with blue and green velvet, gorgeously embroidered with swans and antelopes of goldsmiths' work. The latter lodged at Caludon Castle, whence he proceeded to the place of trial, on a horse barded with crimson velvet embroydered with lions of silver and mulbery-trees, *his rebus* alluding to the name of Mowbray."—Comp. Co. Hist.

† Gibbon.

‡ Those who held of the king in capite, *per servitium militare*, were called *barones minores*, and were exclusively summoned by the sheriffs

et barones regni Angliæ quibus ipse Rex dignatus est brevia summonitionis dirigere venirent ad parliamentum suum, et non alii nisi fortè dominus Rex alia illis brevia dirigere voluisset."

The dignity of baron created by regal tenure, does not mean a peer or lord of parliament, although the writs of summons described both the barons and lords of parliament, with few exceptions, *domini, milites, chivalers;* those, however, who sat in parliament among the barons by tenure, and merely by writ, were, from being called their peers, or equals, invariably reputed barons, as they are at the present day.

By a charter to the Church of Rome, King John styled the earls of Salisbury, Boulogne, Warren, and Ferrars, *hi quatuor barones nostri.* In the 23d of Ed. I. John de Greystok was summoned to parliament as *Johanni Baroni de Greystock,* as were several of his descendants; and from the 27th of Ed. I. to the 1st of Ed. II. Edmund de Stafford was summoned to parliament as *Edmundo Baroni de Stafford.*

The names of some of the barons who were living in the reigns of Edward I. and Edward II., and who were not summoned to parliament: —

" Nicholaus de Carru, Dominus de Molesford.
Johannes le Breton, Dominus de Sporle.
Walterus de Bello Campo, Dominus de Alecestr'.
Johannes de Hudleston, Dominus de Aneys.
Ricardus de Talbot, Dominus de Eccleswell.
Rogerus de Bellario, Dominus de Kryche.
Johannes, Dominus de Kingeston."

In Mr. Cruise's treatise it is asserted, " that feudal dignities were transferable with the feuds to which they were annexed, and that a purchaser acquired the dignity with the estate." This doctrine requires some elucidation, which the barony of Kryche may possibly afford.

Ankere, Baron de Frescheville, Lord of Kryche, in Derbyshire, descended from Hubert, Baron Fitz-Ralph, Lord of Kryche (9 Hen. 3.), died in the 54th year of the same reign, when it was found he held that manor of the king, as tenant in capite, by barony: to whom succeeded Ralph, the next Baron de Frescheville, his son and heir; who (15 Ed. 1.), on paying his relief and doing his homage, had livery of his lands, excepting the manor of Boney, or Bunny, in Nottinghamshire, which he and his father also held of the king, as tenant in capite, by barony, and which was retained by Richard de Grey, until the fine imposed on Ankere, his father, who joined the rebellious barons at Northampton, was paid according to the *dictum de Kenilworth.* This Ralph had summons to parliament (25 Ed. 1.), in right of his lands he held by barony, as " Radulphus de Freschevill;" but neither himself, his son, or any of his descendants, were afterwards summoned (19 Ed. 2.): Roger Beler, who was an eminent judge in that reign, and possessed of a large estate, purchased the manors of Kryche and Banny, of Ralph, Baron de Frescheville; and which manor of Kryche Roger Beler held of the king, for a knight's fee, as tenant in capite by barony, whereupon he did homage, and became the next Baron and Lord of Kryche; the ancient custom, on the transfer of a barony, whether the purchaser could deduce a family alliance or not, and which, in point of fact, amounted to a new creation.

Edward Nevill, in the reign of King James the First, claimed to be summoned to parliament by writ, in respect of his barony of Bergavenny: the claim being put to the vote, the majority of the Lords decided that the barony should be allowed him, as heir male; upon which he had summons, and sat in the place of the last Baron Bergavenny.

" With respect to the dignities of Le Despencer and Bergavenny," says Sir William Betham, " when the Lords proposed to leave to the king the choice to which of the parties the dignity of Bergavenny should be given, they must have considered both dignities personal; and when they put it to the vote, to which the title of Bergavenny should be given, they must have considered the dignity personal; for otherwise it could not belong to Lady Mary Fane, who had not the territory of Bergavenny."

The statute of 12 Car. 2. c. 24. which took away the court of wards and liveries, tenures in capite, and by knights' service and purveyance, contains this proviso, " That neither this act, nor any thing therein contained, shall infringe or hurt any title of honour, feudal or other, by which any person hath or may have right to sit in the Lords' House of Parliament, as to his or their title of honour, or sitting in parliament, and the privilege belonging to them as peers."

By this law of King Charles the Second, the purchase merely of any baronial estate or caput baroniæ (except where a dignity is granted to the actual possessor of a territory, by special legislative enactment, similar to that of Arundel castle), will not avail any person to acquire a feudal dignity; for the purchaser could not now hold of the king, as tenant in capite by barony, to establish his purchase. By an express reservation in the act of the ancient

feudal titles of honour, the dignity of a baron of the realm, created by the operation of the regal tenure of a baronia integra, and "fixed in the blood," is vested by descent; and the heir or heir general of a dignity derived from a barony need not have the possession, or ownership, of any part of the baronial estate.

BERKLEY BARONY.

By a charter of King Richard the First, Maurice de Berkley held the manor of Berkley, in Gloucestershire, with Berkley Hernesse, of the king, for five knights' fees, as tenant in capite by barony. "Thomas de Berkley," Mr. Nicolas observes, "who was not possessed of Berkley castle, was summoned to parliament (21 Hen. 8.); his son and heir, Thomas, was summoned (25 Hen. 8.), and sat on every occasion in the precedency of the ancient barony, though he was not possessed of Berkley castle; Henry de Berkley, son and heir of Thomas, succeeded to the possession of Berkley catsle in 1553, and sat in parliament in 1557, in the same place as that in which his father sat." In the Committee of Privileges of the House of Lords, on the 16th of June, 1830, the present Lord Chancellor, who was counsel for Colonel Berkley, the claimant of the title, &c., who is in possession of the manor of Berkley castle, spoke in substance as follows:—

"That when he last addressed their Lordships he had shown the existence of barony by tenure, in former times, by the dicta of high judicial authorities, the records of parliament, and the decisions of their Lordships' House. There was no authority to show that its existence had ceased. It had survived that great measure of the 12th of Charles the Second, whereby all military tenures were abolished; for in that very measure there was an express provision, that the privilege of being summoned to parliament, as parcel of a tenure by barony, should be saved. It remained with the other side to show what Chief Baron Comyn meant, when he said, 'that there was also a barony by tenure to be enjoyed by those who held certain lands, to which the privilege of a peerage was attached.' On the death of Edward VI., the reversion of the barony devolved on the heirs general of the Marquis de Berkley; and it appeared that, in the reign of Philip and Mary, Henry Lord Berkley was accordingly summoned to parliament, and took his seat, not as the heir of the lord who had been created by writ, but by virtue of his tenure, for he enjoyed the same rank as the ancient Barons de Berkley."

REVIEW.

Manual of Improved Precedents, containing Forms of Declarations on Bills of Exchange and Promissory Notes, etc. etc., with a Digested Summary of various Points of Law relating thereto, etc. etc. etc. By Joseph Napier, Esq., Barrister at Law. Dublin: Hodges and Smith, College-Green, 1831.

THE object of this work appears to be to furnish a series of Forms of Pleading on Bills of Exchange and Promissory Notes of a more concise kind than have hitherto been prepared; and to give an outline of this department of commercial law. The author acknowledges that he is indebted for many of the proposed alterations to the suggestions of Mr. Justice Patteson when at the bar, from whom he derived his legal education. Amongst the improvements recommended, is one for diminishing the prolixity of pleadings by the consolidation of the common counts and the count for interest.

We think there is considerable merit in the preparation of the precedents, and that both learning and industry are displayed in the notes; but we cannot admire the method of the composition. Indeed, the author has not done himself, or the importance of his materials, justice, in the plan he has pursued. His forms, though useful, are not the most essential part of the book; yet he has placed them, as if they were so many acts of parliament, in the text of the work, and in general appended the cases and remarks as mere casual notes. In addition to the decided authorities which the work contains, there are some valuable cases and opinions, which serve at least to illustrate the doctrines to which they relate.

It is not usual in a work of this kind to find any disquisition on the character of the judges who have decided the cases comprised in the treatise; but our author has deemed it necessary to observe, that it is frequently a matter of importance, for the purpose of estimating the value of judicial decisions, to know the legal character and reputation of the judge; and he, therefore, gives his views of the legal capacity of the judges during the decision of the most recent commercial cases. Our own pages have furnished, we trust, a sufficient guide with respect to many of these legal dignitaries; but it may not be inappropriate to introduce the opinions of the present author, especially as he has noticed some of the retired judges, and others who have not yet come under our consideration.

We close, therefore, with the following extracts:—

"1. Lord *Tenterden*. At nisi prius his lordship's decisions are often dubious, and his judgment is habitually cautious. But when the C. J. obtains

a little leisure, to enable him to deliberate on a commercial question, his decision is invariably found to be luminous, accurate, full of sound law, and sound common sense. He is not a "black letter" lawyer; but probably no judge on the bench is more profoundly learned in the system of commercial law, which may be considered as owing its origin to Lord Mansfield.

"2. Lord *Wynford* possessed, when on the bench, the leading defects of Lord Mansfield, consisting of an affectation of trying causes on the principles of equity, in which he frequently substituted an ignorance of the law of equity for the equity of law. His decisions at nisi prius are sufficiently firm. Lord Tenterden has on more than one occasion overruled the decisions of Lord Wynford, as possessing but little authority. He was an able advocate.

"3. Sir *N. C. Tindal* has been but a short time on the bench, and hence it is difficult to speak of his judicial merits. His knowledge of law is sound and accurate, and his judgments are exceedingly clear, with rather an excessive developement of principles. I rather prefer his nisi prius decisions to those of Lord Tenterden. He only wants experience and confidence.

"4. Sir *John Bayley* is scarcely ever wrong in points of law. He not unfrequently takes up some "crotchet," as it is called, which may not exactly involve the merits of the case before him, but whatever he states as law generally, is most accurately stated. If Lord Tenterden and he nod heads together over any dictum, you may book it as sound law. Any one who knows the character of Sir John's MS. books, which are said to contain every case that ever was or ever will be decided in Westminster Hall, will at once admit the truth of these observations. His judgments, therefore, contain a mass of legal learning, but its applicability to the case should always be scrutinised. His dicta (from what I have stated) deserve great attention.

"5. Sir *Joseph Littledale* is a man of profound learning. He has studied Comyn's Digest from cover to cover, and examined with accuracy almost every case referred to in that comprehensive work. Lord Tenterden pays great attention to any points of law decided at nisi prius by Sir Joseph. His prepared judgments in Banc display the deepest research and most accurate logic. He has one essential defect, and that arises probably from his technical learning as a pleader; he sees objections as with a telescope, and attacks their very shadows. But I know no judge on whose decisions, in cases involving profound principles of law, I would with more confidence rely.

"6. Sir *James Parke*. This learned judge has not been long upon the bench; but he has been sufficiently long there to prove that he possesses the legal acquirements of Sir N. C. Tindal, with the sound common sense of Lord Tenterden. He takes a decided lead in the court, and is evidently looked up to by court and bar with the greatest respect and attention. Among the recent appointments, we may class with those of Sir N. C. Tindal and Sir James Parke, the still more recent nomination of Sir John Patteson and Sir E. H. Alderson. These are all able lawyers in their full vigour, and capable of taking advantage of judicial experience. It is a manifest improvement on the system of making the bench 'an old man's hospital.'

"7. Lord *Ellenborough*'s character appears most correctly given by *Mansfield* C. J. in *Fentum* v. *Pococke*, 5 Taunt. 192., and by *Bayley* J. in the *King* v. *Burdett*, 4 B. & A. 153. His nisi prius decisions were given with great firmness, and are of great authority; especially those collected in the admirable Reports of Mr. Campbell.

"8. Sir *G. S. Holroyd* was, unfortunately for the profession and the public, too advanced in years when elevated to the bench. Whatever he sat or delivered a legal opinion, his authority is beyond praise.

"For an illustration of some of the characters here given, I would refer to the judgment of the King's Bench in *Rennell* v. *Bishop of Lincoln*, 7 B. & C. 113., *King* v. *Westwood*, (in Dom. Proc.) 7 Bing. 1., and *Holdsworth* v. *Hunter*, 10 B. & C. 449., and *Blundell* v. *Catterall*, 5 B. & A. 268."

HINTS FOR THE IMPROVEMENT OF THE LAW.

No. III.

The newly-acquired business in the Court of Exchequer will receive a considerable check, in consequence of the rule lately made as to *subpœna* and attachment. A great many practitioners resorted to that Court on account of the facility of service of process of *subpœna*, which writ by this rule will be entirely done away with; for upon a bailable cause of action, the writ of *quo minus* will be resorted to in the first instance. Many instances have occurred in my own practice of an attachment producing payment of a debt at once; whereby justice is done to both parties, for the plaintiff gets his debt, and the defendant has but small costs to pay. It has, however, been too much the fashion lately to consider the *comfort* and *convenience* rather of debtors, as if they were the injured parties, than of creditors, who are obliged to resort to legal measures to compel payment of a just debt.

If a rule of Court was made, or an act passed, giving a plaintiff in actions under 20*l.* power to enter an appearance where the defendant made default, upon a *subpœna*, it would be doing the public great service; but as the practice now stands with regard to that writ (if a plaintiff's attorney should be weak enough to issue one), in a bailable action, a term is certainly lost, and the debt cannot be recovered, if a defendant chooses to remain in gaol; because on an attachment and *subpœna* you cannot declare till the defendant chooses himself to enter an appearance.

STAMPS — SOLICITOR AND CLIENT.

As of course, on the meeting of the new parliament, the various bills which dropped by the dissolution will be taken up again, amongst which, I believe, was the Stamp Act, I should be glad

if the attention of the profession and the framers of the act were called to the subject of payments by attorneys to their clients of monies received by them, and for which, of course, receipt stamps have been given. This subject has been, if I recollect right, before adverted to by one of your correspondents; but I would suggest that cheques by clients or their solicitors might be drawn, and rendered valid on evidence of payment; and, to prevent fraud, I would have the cheque express particularly on what account, action or application, the money is paid over. This would increase the stamp duties, as then solicitors might be obliged to give receipts for their own bills, which, as matter of account, is now very rarely done.

G. P. P.

THE NEW RULES OF PRACTICE.

In pursuance of the 11 Geo. 4. and 1 W. 4. c. 70., the Judges have at length promulgated several general rules for regulating the practice of all the Courts. They are signed by all the Judges, with the exception of Mr. Baron Garrow, who is unwell. We shall print them at length in our next Monthly Record, and in our weekly publication shall make some remarks on the alterations they will produce in practice. We here subjoin an analysis of them:—

1. Concise forms are prescribed of declarations on bills of exchange and promissory notes, without the common counts.

No costs will be allowed for any excess in length, beyond the forms, either between party and party, or attorney and client; and defendants will be allowed costs occasioned by excess, to be deducted from the attorney's bill.

2. Bail may be justified at the time of putting in, on four days' notice, exclusive of Sunday.

Time allowed to enquire, not exceeding three days in town and six in the country.

The several residences of bail within the last six months to be stated, and whether housekeeper or freeholder.

If notice of bail be accompanied with affidavit, costs of justification allowed where excepted to, if not rejected; and costs of opposing allowed if the bail be rejected.

If one day's notice of exception not given, no other justification necessary than the affidavit.

Bail cannot be changed without leave of the Court or a Judge.

3. Full particulars of demand to be delivered with declaration in certain cases, where comprisable in three folios. If not, such statement of claim as can be so comprised.

If not then delivered, the costs of subsequent delivery, if ordered, not to be allowed.

Copy of particulars of demand and set off, if any, to be annexed to record by plaintiff's attorney.

4. No imparlance in declarations delivered on or before last day of term, whether defendant in or out of custody.

5. Four days' demand of declaration, &c. before judgment of *non pros.*

6. Only two summonses before a judge necessary.

7. The plaintiff not to declare *de bene esse*, till six days after service of process or arrest, the day of service or arrest inclusive.

8. Declarations in ejectment may be served before first day of term, instead of the essoign day.

9. One day's notice of taxation necessary.

10. No motion necessary to plead several matters, &c., but a rule to be drawn up on a judge's order, granted on summons.

No summons necessary in certain cases, but the rule to be drawn up on producing the pleas.

The rules as to ejectment to take effect on the 25th October. The others on the first day of Michaelmas term.

A form is given of affidavit of justification to be made by bail.

NOTES OF THE WEEK.

IMPRISONMENT FOR DEBT.

We have inserted a paper from one of our contributors, regarding the abolition of imprisonment for debt. It will be observed, that the writer is in favour of the existing practice, except for small debts; but he does not state the *minimum* which he would admit to be expedient. We have made many enquiries of practical men; and so far as we have proceeded, find them equally divided in opinion. Each party professes to be guided in their conclusions by their own experience of the good or bad effects of the system. Having opened our columns to the advocates of a limited adherence to the old code, we shall, of course, freely admit the opinions of those who seek its total abolition.

LAW ASSOCIATION.

By the report made to the general meeting of this society, it appears that the permanent fund for the objects of the charity now amounts to nearly 16,000*l.* stock. We sincerely wish it increased prosperity. When we recollect that almost every profession and calling is distinguished by the benevolent provision which it makes for its unfortunate members and their families, and call to mind that the success of the practitioner of the law is peculiarly dependent on his personal exertions, it would, indeed, be discreditable, if a society like this were not supported. We must defer the insertion of the annual report till the next Monthly Record, where it will appear in the department devoted to public meetings relating to the law.

SUPERIOR COURTS.

LORD CHANCELLOR'S COURT.

TENANT FROM YEAR TO YEAR — RENT.

A remainder man is entitled to the proportionate part of the rent from a yearly tenant, and not the representative of the tenant for life, although a receiver has been appointed.

This was an appeal from a decree of the *Master of the Rolls*. Certain lands were limited to a Mrs. Candler for life, remainder to the appellant in fee. The lands were let to yearly tenants at rents payable half yearly, at Ladyday and Michaelmas, and the rents were paid up to the half year preceding Mrs. Candler's death. The representative of Mrs. Candler (the respondent) now claimed a proportionate part of the rent from the last half yearly payment to the day of her death: the appellant, on the other hand, contended that he was entitled to such proportionate rent. The *Master of the Rolls* had decided in favour of the respondent.

For the respondent it was now contended, that as a receiver had been appointed of the lands in the lifetime of Mrs. Candler with the consent of all parties, the letting the premises from year at year was controlled, and the receiver was right in paying a proportionate part of the rent to the respondent.

The *Lord Chancellor* thought that there was nothing in the particular circumstances of the case to prevent the application of the usual rule on the subject. He was of opinion, therefore, that as the tenancy was from year to year, the remainder man was entitled to the rents from the last half-yearly time of payment. He therefore reversed the order of the *Master of the Rolls*, and directed the costs to be paid out of the fund in court.—*Brown* v. *Candler*. L. C. May 11. 1831.

APPEAL — PRACTICE.

A decree cannot be appealed from after the lapse of fifty years.

This was an appeal from two decrees made by Lord *Thurlow* in the years 1784 and 1789. On its being called on,

Sir *Edward Sugden* objected to its being heard. It had been a long established rule of practice that a cause which had been heard, and in which a decree had been made, could not be re-opened after twenty years.

Mr. *Teed*, on the other side, contended, that, as the parties now seeking to set aside the decrees only became entitled in 1825, the rule did not apply to them.

The *Lord Chancellor* considered that the appeal could not be heard. The decrees were nearly fifty years old; and the principle of the court was, that after the lapse of such a period of time litigation should cease. He therefore dismissed the appeal.—*Rolfe* v. *Thompson*. L. C. May 12. 1831.

ROLLS COURT.

DEVISE — CONSTRUCTION.

Where an estate is devised to A. *in fee if she attain twenty-one, and if not, over to* B. *without words of limitation,* B. *will also take an estate in fee.*

In this case a testator had devised his estates to trustees upon trust to convey the same to his natural daughter if she attained the age of twenty-one years; but if she died before that period, then he gave to the defendant all his lands and premises situated at Liverpool. The testator's natural daughter not having attained twenty-one, the question was, whether the defendant took an estate in fee or for life.

The *Master of the Rolls* said, that if the simple limitation to the defendant were alone to be taken into consideration, there would be no doubt that she would take a mere estate for life; but on looking through the whole of the will he was of opinion that there was a clear intention on the part of the defendant that she should take a fee. That the trustees took an estate in fee, it was impossible to doubt, as they were to receive the rents and profits of the lands during the minority of the daughter; and when she attained twenty-one, to convey to her the lands in fee. But the testator provided, that if she died during her minority the lands should then go to the defendant. The first substitution was in respect of his real estate, which, omitting the word "hereditaments," he gave to the defendant; and the question was, whether there was not a sufficient intention expressed that she was to take by a conveyance from the trustees in the same manner by which the daughter would have taken if she had attained twenty-one. He was of opinion that this was the proper construction of the devise. It was a mere substitution of the defendant in the place of the daughter, to be effected by the same conveyance, which, had she attained her majority, would have entitled the daughter to an estate in fee.—*Bowles* v. *Jopling*. M. R. May 25. 1831.

COURT OF KING'S BENCH.

(Before the four Judges.)

LANDLORD AND TENANT — SHERIFF—8 ANNE, c. 14. § 1.

Where a year's rent is due, the sheriff is bound, under the 8 Anne, c. 14. § 1., *to withdraw, if the judgment creditor does not pay a year's rent to the landlord, and the proceeds of the sale of the goods are not likely to amount to a year's rent.*

Chilton showed cause against a rule obtained by the defendant, calling on the plaintiff to show cause why, on the defendant bringing into Court 75*l.* 15*s.* 6*d.* to abide the event of the suit, the proceedings should not be stayed until the plaintiff should undertake to pay the costs of the suit in the event of his not recovering against the defendant a larger sum than 75*l.* 15*s.* 6*d.*; and the proceedings in the mean time be stayed. This rule had been obtained on an affidavit, which stated, that the present was an action against the sheriff for having removed goods from premises without the judgment creditor paying a year's rent, out of that which was in arrear, contrary to the provision of the 8 *Anne*, c. 14. § 1. The amount of a year's rent was 105*l.* Much more than one year's rent was

owing. Notice of rent, being in arrear was given to the sheriff. Notwithstanding, the sheriff proceeded to sell, and the goods produced only the sum of 75*l.* 15*s.* 6*d.*, the judgment creditor not having previously paid the amount of a year's rent. A similar application in somewhat a different form had been made in this case to the Practice Court, and Mr. Justice *Taunton* decided against it. This judgment he would read. His Lordship said*, "On a special action on the case, the landlord is entitled to general damages. Those damages are not to be limited by the mere amount of the sum of money produced by the sale. He has a right to say, 'that if you had proceeded regularly according to the statute, the whole amount would have been paid; and you not having proceeded regularly, but having chosen to sell before the year's rent was paid, I have a right to general damages; but for your misconduct in not giving proper notice, or by other negligent conduct, the goods sold badly.' All these matters may be made use of to aggravate the damages. This is an application that all the proceedings in the case should be stayed on paying merely the dry proceeds of the goods after sale. I am of opinion, that that is not the strict measure of damages. The damages may exceed that measure; and therefore the Court is not now to take that as a measure, which may not be taken as one at the trial." This, he submitted, showed clearly that the present application could not be granted. The sheriff had no hardship to complain of. If he found that the goods were not likely to produce more than the year's rent, he might withdraw; he was not obliged to proceed to a sale.

Lord *Tenterden* C. J. The sheriff may withdraw: at least, that seems to be the intention of the legislature, from the words of the act.

Platt, contrà. If that construction were put upon the act it would be productive of the greatest injustice to sheriffs. At any rate, the sheriff can not be liable for more than he has obtained by the sale of the goods.

Lord *Tenterden* C. J. The words of the statute are, "no goods or chattels whatsoever, lying or being in or upon any messunge, lands, or tenements, which are or shall be leased for life or lives, term of years, at will, or otherwise, shall be liable to be taken by virtue of any execution on any pretence whatsoever, unless the party at whose suit the said execution is sued out, shall, before the removal of such goods from off the said premises by virtue of such execution or extent, pay to the landlord of the said premises, or his bailiff, all such sum or sums of money as are or shall be due for rent for the said premises at the time of the taking such goods or chattels by virtue of such execution, provided the said arrears of rent do not amount to more than one year's rent: and in case the said arrears shall exceed one year's rent, then the said party at whose suit such execution is sued out out, paying the said landlord, or his bailiff, one year's rent, may proceed to execute his judgment as he might have done before the making of this act; and the sheriff, or other officer, is hereby empowered and required to levy and pay to the plaintiff as well the money so paid for rent as the execution money." The act certainly contemplates that the judgment creditor should satisfy the demands of the landlord to the extent of a year's rent before the removal of the goods. If he do not satisfy the landlord to that extent, then it seems to me that the sheriff ought to withdraw. There may, it is true, be some inconvenience resulting from a collusion between the landlord and his tenant. Where there are not sufficient goods to produce by sale the amount of a year's rent, and the sheriff has withdrawn, the landlord may say to his tenant, "You may now remain;" and by this mode of collusion they may defraud the creditor. If, however, the sheriff's officer were not bound to withdraw, it would be in his power to put the landlord to an action. The contrary course has, certainly, generally been adopted, and the goods have been sold, and the landlord's rent paid out of the proceeds, and the surplus transferred to the creditor. But, by the strict words of the act, the creditor must pay a year's rent before the removal of the goods; and if it appears, that the goods are not likely, in the opinion of the sheriff, to produce enough to satisfy the year's rent, the sheriff may withdraw.

Littledale J. concurred.

Parke J. We ought to be guided by the words of the first section of the act; and they are positive, that the year's rent must be paid before the removal of the goods. This is an application to pay money into court. It is not usual to allow money to be paid into court, except in those cases where a plea of tender may be pleaded. Now, there cannot be a plea of tender in an action of *tort*. The jury are not bound by the sum for which the goods sold; they are not even bound to find to that amount.

Patteson J. This is only an attempt to pay money into court by means of this application in an action of *tort*, where by the rules of law it cannot be done.

Rule discharged without costs.

This decision confirms that of Mr. Justice *Taunton*, reported by us in 2 L. O. p. 11., to which Mr. *Chilton* referred in his argument.

PLEADING — REPLEVIN.

In an action of replevin, where the defendant "avows" in one part of his cognisance and "acknowledges" in another, from which it is doubtful whether he alleges himself to have acted as landlord or agent, but the plaintiff in his declaration has described the defendant as "the agent or attorney" to a certain person, the defect may be cured by reference to the declaration.

In an action of *replevin*, the defendant made cognisance as bailiff of Sir Wastell Briscoe. In the first part of his cognisance he alleged that "he well avows the taking," &c. and in the latter part "he well acknowledges the taking," &c. To this the plaintiff demurred, on the ground, that it did not appear, whether the defendant had acted as the landlord, or his agent.

Hulme supported the demurrer, and submitted, that the cognisance of the defendant was bad; for, by the allegation in the former part o

* See 2 L.O. p. 11. This case is reported at the above place under the title of *Foster* v. *Hilton*.

it, he appeared to be the landlord; in the latter, he appeared to be the agent. He cited *Wheadon* v. *Luff*, Cro. Jac. 373.; Com. Dig. tit. *Pleader*, 3 (K) 14.; and *Owen* v. *Williams*, Yel. 108. Ib. *Knowles, contrà*, was stopped by the Court.

Lord *Tenterden* C. J. If there be any difficulty introduced by the defendant from the course he has pursued, it is removed by the plaintiff himself; for in his declaration he calls the defendant "the agent or the attorney to Sir Wastell Briscoe." There really is nothing in the point.

Judgment for the defendant. *Nicholson* v. *Lightfoot.* E. T. May 5. 1831.

PRACTICE COURT.

AFFIDAVIT OF DEBT.

If an affidavit of debt on a bill of exchange does not state that it was due at a day past, it is bad.

Alexander showed cause against a rule for discharging the defendant out of custody, who had been arrested on an alleged defective affidavit to hold to bail. The action was on a bill of exchange, and the affidavit did not state it to be due "at a day now past." He submitted the allegation, that the defendant "was indebted" to him in the amount of the bill, was sufficient. Unless the bill had been due at a day past, the defendant would not be indebted to him.

Patteson J.—He could not, in one sense of the term; but the plaintiff might very safely swear that the defendant was indebted to him, though the discharge of the debt was to take place at some future time. It might be *debitum in præsenti, solvendum in futuro.* It would be difficult to assign perjury on that affidavit; the defendant must therefore be discharged.

Rule absolute.* — *Olney* v. *Bowles.* T. T. May 27. 1831.

DISTRINGAS ISSUES — IRISH PEER.

On a distringas against the goods of an Irish Peer, the amount of the debt only, without costs, can be taken.

Bosanquet, S. R. applied for a *distringas* against the goods of an Irish peer. The debt was 80*l.*; but with the costs the plaintiff's demand amounted to more than 100*l.* The motion, therefore, was for leave to take 100*l.*

Patteson J. The practice of the court is, not to allow you to take more than the debt at first. You may therefore take 80*l.*

Todd v. the *Earl of Winterton.* T. T. May 30. 1831.

EJECTMENT. 1 GEO. 4. c. 87. §§ 50. 52.

The security required under the 1 *Geo.* 4. *c.* 87. §§ 50. 52., *from tenants, is, according to the practice of the King's Bench, one year's rent, and* 40*l. for costs.*

Holroyd applied for a rule †, calling on a tenant to enter into the recognisance, and give the security required by the 1 Geo. 4. c. 87. §§ 50. 52. He was not aware of the amount of the security required by the Court in such cases.

On reference to the officer of the Court, he reported, that the practice was, to require security for one year's rent, and 40*l.* costs.

Anonymous. T. T. May 30. 1831.

BAIL.

The Court will allow three persons to justify, where the amount of the debt is 5000*l.*

Platt applied for a rule to show cause why three persons, instead of two, should not be allowed to justify for a sum of 4000*l.* The sum for which the action was brought was 5000*l.*; and therefore the bail would each have to justify in the sum of 4000*l.* One bail did justify to that amount. The other could not swear himself worth 4000*l.*, and therefore was rejected. Time was given to justify another. Great difficulty was found in discovering one person who would justify in the amount of 4000*l.* The application was therefore made to allow two persons to justify in 2000*l.* each, and one in 4000*l.*

Patteson J. You may take your rule.

Rule granted. ‡

Palmer's Bail. T. T. May 30. 1831.

BAIL — JURISDICTION.

A lodger in England, possessed of a house in Scotland, cannot justify as bail.

Archbold objected to the justification of a bail, who stated that he was a lodger in England, but was a householder in Scotland, and possessed of money at his banker's in this country.

Patteson J. rejected him, and refused time to add another, on the ground that the defendant should have been aware of the fact, that the bail was not a freeholder or householder in this country.

Bail rejected. § *Anonymous,* T. T. May 23. 1831.

BAIL — HOUSEKEEPER.

A person renting the whole of a house except a shop, living and sleeping there, keeping the key of the outer door, paying rent directly to the landlord, is a housekeeper.

Dowling opposed bail on the ground of his not being a housekeeper.

The bail stated, that he rented the whole of a house, with the exception of a shop. He paid rent directly to the landlord. He had the key of the outer door, and the person renting the shop was always obliged to apply to him for it if he wanted it. He lived in the house, and slept

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* See *Jackson* v. *Yate*, 2 Man. & Sel. 148.; *Holcome* v. *Lambkin*, ib.; *Edwards* v. *Dick*, 3 B. & Ad. 495.; *Macher* v. *Fraser*, 7 Taun. 171.; 2 Marsh. 483. S. C.; 4 Moore, 18. C. P. *accord.*; *Davison* v. *March*, 1 New. Rep. C. P. 157. *contrà.*

† This rule is absolute in the first instance.

‡ For the practice in serving, and showing cause, against the rule in such a case, as also in other similar instances, in which the Court will interfere, see *antè*, p. 45.

§ This decision is in accordance with a case in 11 Price, 158.

there. The person renting the shop did not sleep there. The only passage into the house was through the shop.

Barstow, in support of the bail, submitted that the bail was a housekeeper. To prove that he was, it was only necessary to try the case by the test of, whether it might be alleged in an indictment for burglary, that this house was the dwelling-house of the bail.

Patteson J. I think he is a housekeeper. This is either his house, or it is nobody's.

Turner's bail. T. T. June 2. 1831.

EJECTMENT — INTERVENING TERM.

Where a term intervenes between the serving of a declaration in ejectment, and the motion for judgment against the casual ejector, the rule for judgment must be served on the tenant in possession before judgment is signed.

Talfourd moved for judgment against the casual ejector. The declaration had been served before the essoign day of Easter term, with notice to appear in Easter term.

Patteson J. You may have your rule for judgment; but the practice is, that you must serve the rule, before you sign your judgment, in order that the tenant in possession may not suppose you have abandoned your proceedings.

Rule granted. *Doe* v. *Roe.* T. T. June 1. 1831.

CONTRACT — IMMORALITY.

Where a set of prints has been sold, and some of them are of an immoral character, the defendant is liable for all of them not immoral.

White moved for a rule to show cause why the verdict for the plaintiff in this case should not be set aside on the ground of misdirection. The cause was tried at the sittings after Trinity Term, before Lord *Tenterden* C. J., and a verdict found for the plaintiff. It was an action to recover the value of a quantity of prints, above two hundred in number. They were sold in sets of fourteen each. The defence was, that the prints, were of an immoral tendency. The question submitted to the jury was, whether the prints, taken altogether, were of an immoral tendency, and calculated to inflame the passions. He submitted, that the direction ought to have been, whether any of them was of an immoral tendency, and if any were, the plaintiff was not entitled to recover. Any one of them being immoral was sufficient to render the contract void. At least, he could not recover for that set, of which it formed a part.

Per Curiam. The question was rightly left to the jury. If any one print in a set were immoral, and the defendant kept that set, he was bound to pay for all, with the exception of the immoral one. The verdict must therefore stand.

Rule refused. — *Elster* v. *Truman*, T. T. May 26. 1831.

PEER — DISTRINGAS.

Service of a summons on a peer at his residence, when he is absent in France, is sufficient.

Bayley moved for a *distringas* against the goods of a peer. The summons had been left at his house, when the officer serving it was informed by a servant that his Lordship was in France. The sheriff was therefore in some doubt as to whether that was a sufficient service.

Patteson J. The service will do, whether it be personal, by leaving the summons at the peer's dwelling-house, or his last place of abode. This service being at his house, from which he was temporarily absent, must suffice. *

Distringas granted. — *Anonymous.* T. T. June 8. 1831.

COURT OF COMMON PLEAS.

BILL OF EXCHANGE. — INDORSEE. — HUSBAND AND WIFE. — PRINCIPAL AND AGENT.

Where a bill of exchange was drawn by a husband and at the request of the acceptor in the name of his wife, and was afterwards indorsed by her: Holden, that the indorsee could maintain an action against the acceptor.

Assumpsit on a bill of exchange of the indorsee against the acceptor. At the trial it appeared, that the defendant had placed his daughter at a school kept by a lady named Bickerstaff at Kensington. That lady was a married woman, and, at her husband's desire, had requested the defendant to accept a bill for the amount of the daughter's schooling before the time for which that amount would become due had expired. The bill was drawn by the husband, but, at the defendant's request, in the wife's name, and it was afterwards endorsed by the wife to the plaintiff. It was insisted for the defendant, that the indorsement of a bill of exchange by a married woman in her own name was not sufficient to transfer the property in it to a third person, and the case of *Barlow* v. *Bishop*, 1 East Rep., was cited as an authority in point. In that case *Ann Parry* was the indorser of the note. She was married, but traded with her husband's consent in her own name. She became indebted to the plaintiff; and to enable her to pay him, the defendant, who knew she was married, gave her a note payable to her or order. She indorsed in her own name to the plaintiff, and he brought this action. Lord *Kenyon* thought it not maintainable; but saved the point, and after a rule *nisi* for a nonsuit, and cause shown, he said, it was clear that the delivery of the note to the wife vested the interest in the husband, that as he permitted her to trade on his account, and this was a transaction in the course of that trade, he was not prepared to say, that had she indorsed the note in his name it would not have availed; the jury might have presumed that she was authorised by her husband; but the indorsement being in her own name, it was impossible to say it could pass the husband's interests. It was contended that that case laid down the principle on which the present must be decided; and that, consequently, the plaintiff in this action, having no legal property in the bill transferred to him by this indorsement, must be nonsuited. The learned judge who tried the cause, however, refused to nonsuit the plaintiff, as he thought that the authority of the husband

* See 2 Cromp. 138. ed. 3. 1 Tid. Prac. 118. ed. 9.

was here manifestly visible; and that the bill, though drawn in the name of the wife, had been drawn and indorsed for the benefit and at the request of the husband. A verdict was accordingly taken for the plaintiff, subject to the opinion of the Court. A rule having been since obtained to set aside the verdict and enter a nonsuit, cause was shown against the rule by *Taddy* Serjt., and *Cross* Serjt. was heard in support of it.

The *Lord Chief Justice* observed, that in his opinion the case of *Barlow* v. *Bishop* did not govern the present. In that case, the note was drawn for the sole benefit of the wife, and there was nothing to show that the husband had authorised the indorsement, which indeed seemed to have been made entirely for her benefit, and on her responsibility alone. In the present instance, it was evident that the bill had at first been procured at the request and for the benefit of the husband, that he had himself drawn it out, and it had been drawn in the wife's name, and indorsed by her, only because she was the person to whom the defendant considered himself indebted. The circumstance, which was wanting in the case of *Barlow* v. *Bishop*, viz. the authority of the husband, existed here, and varied this case from the former. The verdict for the plaintiff ought not to be disturbed.

Park J. said, he wished it to be expressly understood that he fully assented to the doctrine laid down in *Barlow* v. *Bishop*; but was of opinion, that this case was distinguished from it in circumstances. The case of *Coates* v. *Davis* much more nearly resembled the present; and indeed carried the matter farther than was required by the circumstances of this case. That was an action by the indorsee, against the maker of a note payable to "Mrs. Carter or order," and indorsed by her in her own name. The defendant then offered to show that "Mrs. Carter" was wife to one Cole; but it being proved that subsequently to the indorsement, and when the note was presented for payment, the defendant had promised to pay it, Lord *Ellenborough* said, the jury might presume that she had authority from her husband to indorse the note; and by the name in which she had passed in the world. In that case the jury had been told to make such a presumption, on the mere ground of the subsequent promise; surely they would have had much more reason to do so in the present instance, where the husband had drawn out the bill, where it was drawn for his benefit, and where the defendant himself had required the wife's name to be used; because, perhaps, he thought, that if he paid a bill in the husband's name alone, he should still be liable to the wife, by whom the work was in reality performed.

Gaselee and *Bosanquet* J. J. concurred. Rule discharged. *Prestwick* v. *Marshal*. H. T. May 7. 1831.

ERRATA.

In the decision in the Court of Common Pleas, headed "Bankrupt, — Fraudulent Preference," in p. 45. *antè*, we have, in our statement of the way the jury found their verdict, substituted the defendant for the plaintiff. This, however, does not affect the decision; for the Court refused to disturb the verdict, on the ground that the credit to be attached to the bankrupt's statement was a question for the jury.

Rolls Court. — *Hennell* v. *Marlin*, p. 89., for Mr. *Cooke* read Mr. *Coote*.

SITTINGS IN CHANCERY.

AFTER TRINITY TERM, 1831.

LORD CHANCELLOR.

Wednesday, June	22.	The First Seal.
	23. to 28.	Re-hearings and Appeals.
Wednesday,	29.	The Second Seal.
	30. to July 5.	Re-hearings and Appeals.
Wednesday,	6.	The Third Seal.
	7. to 12.	Re-hearings and Appeals.
Wednesday,	13.	The Fourth Seal.
	14. to 19.	Re-hearings and Appeals.
Wednesday,	20.	The Fifth Seal.
	21. to 26.	Re-hearings and Appeals.
Wednesday,	27.	The Sixth Seal.
Thursday,	28.	Petitions.

Such days as his Lordship is occupied in the House of Lords are excepted.

VICE-CHANCELLOR.

Wednesday, June	22.	The First Seal.
	23. to 28.	Pleas, Demurrers, Exceptions, Causes, and Further Directions.
Wednesday,	29.	The Second Seal.
	30. to July 5.	Pleas, Demurrers, Exceptions, Causes, and Further Directions.
Wednesday,	6.	The Third Seal.
	7. to 12.	Pleas, Demurrers, Exceptions, Causes, and Further Directions.
Wednesday,	13.	The Fourth Seal.
	14. to 19.	Pleas, Demurrers, Exceptions, Causes, and Further Directions.
Wednesday,	20.	The Fifth Seal.
	21 to 26.	Pleas, Demurrers, Exceptions, Causes, and Further Directions.
Wednesday,	27.	The Sixth Seal.
Thursday,	28.	Petitions.

The Sittings will close on the 10th of August.

MINOR CORRESPONDENCE.

To the Editor of the Legal Observer.

SIR,

YOUR assertion, that "'An Introduction to the Laws of England' is composed from the 'Commentaries,' *without acknowledgment*," being refuted in your extract from the preface, containing an acknowledgment, there remains only one charge worthy notice: "it is *entirely* composed from the 'Commentaries,' generally *verbatim*: there are not two pages that are not transcribed from the first volume." Let your readers judge:—

" The rich, indeed, are left at their own option, whether they will breed up their children to be ornaments or disgraces to their family." — 1 Comm. 451. Christian's edit.

" And it has lately been thought proper to introduce somewhat of this policy into our laws, by statute 20 Geo. 2. c. 33., whereby it is enacted, that all marriages celebrated by licence (for banns suppose notice), where either of the parties is under twenty-one (not being a widow or widower, who are supposed emancipated), without the consent of the father, or, if he be not living, of the mother or guardians, shall be absolutely void." — 437-8.

" The rich, indeed, are not now left at their own option, whether they will breed up their children to be ornaments or disgraces to their family." — See the Wellesley case. [*Wellesley* v. *Duke of Beaufort*, 2 Russ. 1. S. C. 2 Bli. N. S. 124.] *Shelley* v. *Westbrooke*, Jacob, 266.

" And it has lately been thought proper to introduce the statute 4 Geo. 4. c. 76., whereby it is enacted, that unless the parties under age have been previously married, the consent of the parent or guardian is required to the marriage. But it has been decided, that the section (16.) of the statute requiring such consent to the marriage of a minor is *directory* merely; and a marriage has been held valid, though the husband was a minor, and his father, then living, did not consent. — And see 6 Geo. 4. c. 92.; 8 B. & C. 92.

The page you condemn, mistaking it for an " original one," is selected from the work quoted at bottom: the misprint of 'Pierce' for 'Peere' was corrected previous to your notice.

Regretting that your attempt to " show the work to be what it is" *not*, — an " unacknowledged " compilation, — made these observations necessary, I shall intrude no more, however much you " abuse " it, and amuse your readers.

Sir,
Your obedient Servant.

*** We readily print this letter, but we are sorry to say it has not altered our opinion of our correspondent's production. If he intended it to be considered as a mere compilation from Blackstone, he should have stated it, not in his preface, but in his title-page, which is sufficiently diffuse; we think, however, that he has not even stated it in his preface. But of this our readers can judge for themselves, as we extracted that portion of it in our notice of his work. It seems to us that he professes to give a work, which corrects the errors of Blackstone.

We said further, that there were not two pages in the whole work that were not transcribed from the first volume of Blackstone. We now repeat it. Our correspondent has given us half a page of what he considers original matter; we are ready to print the other page and a half, if he will furnish us with them.

The " one original page" is, it seems, also borrowed from a work called " Bibliotheca Legum." Now, we will only ask our readers, whether the abbreviations mentioned in our notice are those used by legal writers; and whether, by adopting them, the compiler of the work has not made them his own?

ANSWERS TO QUERIES.

POWER OF APPOINTMENT — VESTED INTEREST.

1. I should conceive the husband *could* take the property under the will; as, by the words of the settlement, the child or children must, before they can take, attain the age of twenty-one; and as their interest depends on a contingency, (their attaining twenty-one), and they die before that time, I should presume it is lapsed; as in the case of a legacy, and that the husband would take by the appointment, as if there had been no child born at all. T. E.

2. I am of opinion that the will is capable of taking effect in the event of the child's death before attaining twenty-one. For as the wife exercises a power reserved to her, it may fairly be presumed her intention is to act in accordance therewith. If a child of the marriage attained twenty-one, no will that she might make would take effect; or if she had during a child's minority made a will in its favour, the child would not take any greater or less estate thereby. I do not think it can be presumed that, in the event of a child being born, her intention was to have disposed of her property differently, seeing she could not have benefited the child; and therefore by the words " provided there was no child or children of the marriage," she has only alluded to the condition in the power under which she makes her will. The birth of issue after a will does not of itself invalidate such will, and I see nothing on the face of this statement to do so. N.

RESIDUARY ESTATE.

" Dividends are an entire sum due, and payable at a certain day to the holder, whoever he may be, of the stock on that day." They are not apportionable. See 1 vol. Sel. N. P. 614. note 101.; and the authorities there cited. N.

This depends on the fact of the legacy being pecuniary or specific: if the former, the dividends go to the residue; if the latter, they follow the stock. I presume it to be the latter. T. A.

WILL — DIVISION OF PROPERTY.

1. As the infants have clearly contingent reversionary interests in the property, those interests can never be barred or destroyed by the acts of their parents or any other person.

Whatever division, therefore, the executor may make, the infants, or any one on their behalf, may at any time impeach. H. F. G.

2. I apprehend a division of property could not be made with the concurrence of the widow and the three sons, as I conceive the executor would be liable to the infants when of age, at their father's death, for their share of his proportion as left to them by the will of their grandfather; neither do I think the executor would be safe, even if the son's children would consent, if capable, as supposing any of the sons have any other child born during the lifetime of the widow, and AFTER THE DIVISION of the property, I certainly think the executor would be liable to such after-born child for his proportion of his father's share. T. E.

QUERIES.

PROCESS — AFFIDAVITS.

THE 5 Geo. 2. c. 27. § 4. enacts, that upon every process to be served upon any defendant, shall be *written* in words at length in a common legible hand and *character*, an English notice to such defendant, &c. The copies sold by stationers, and, most generally, if not universally, used, have the notices *printed*, with blanks for inserting the defendant's name and the time for appearance; which blanks, when filled up, are the only words in writing. Several books of practice have forms of affidavits of service stating "under which said copy was *written* an English notice," &c., and many affidavits actually state such notice to have been *written*, when it was in part written, and the residue printed. As motions are frequently made to set aside proceedings on frivolous errors, perhaps answers to the following queries may save much trouble and unnecessary delay and expense: —

1. Can a notice, in part written, and the residue printed, be considered as *written* within the intent and meaning of the act cited? or, is the statute in that respect obsolete?

2. Is it necessary that the *affidavit* of service should state, "under which said copy was *written* an English notice," &c.? or, would it not be sufficient to say, *was an English* notice?

3. In cases where the notices have been in part written and part printed, and the affidavits contained the words "under which said copy was *written*," &c., can it be considered that those persons who made such affidavits are free from perjury?

4. Are there any decisions applicable?

W. P. A.

BILL — LIABILITY OF DRAWER.

A., as surety for *B.*, consents to *draw* a bill of exchange for a debt owing by *B.* to *C.* *B. provides the stamp, and writes the body of the bill*, and sends it with his acceptance to *A.* for his signature. *A.*, through inadvertence, omits to sign it as drawer, but indorses and delivers it to *C.* The bill is presented in this state when due, and is dishonoured by *B.* Can *C.* recover against *A.*? See *Elliott* v. *Cooper*, 1 Stra. 609. 2 Lord Raymond, 1576. 8 Mod. 307.

AMICUS.

MISCELLANEA.

AMBIDEXTER.

A circumstance happened at the Rolls Court on Friday, which afforded much diversion. Mr. A——— received a brief of a petition in court a short time before it was called on, for the purpose of opposing the prayer of the petition. Mr. A———, conceiving himself for petitioner, spoke very ably in support of the petition, and was followed by a counsel on the same side. The *Master of the Rolls* then enquired who opposed the petition, upon which Mr. A———, having discovered his mistake, apologised, and informed his Honour that he had instructions to oppose it. The *Master of the Rolls*, with great good humour, desired him to proceed, observing, he knew no counsel who could answer his arguments so well as *himself*. — *New Lady's Mag. for July*, 1788. [The same thing occurred to Mr. Clerk, the Scotch advocate, and more recently to Sir Edward Sugden.]

LEGISLATIVE POWER.

Law, in a free country, is, or ought to be, the determination of the majority of those who have the property in land. — *Swift's Thoughts on Various Subjects.*

INCREASE OF LAWS.

If books and laws continue to increase as they have done for fifty years past, I am in some concern for future ages, how any man will be learned, or any man a lawyer. — *Swift's Thoughts on Various Subjects.*

The Legal Observer.

VOL. II. SATURDAY, JUNE 25. 1831. No. XXXV.

——— "Quod magis ad nos
Pertinet, et nescire malum est, agitamus."
HORAT.

THE NEW RULES FOR THE REGULATION OF COMMON LAW PRACTICE.

THESE rules are now in the possession of our readers; an analysis of them being inserted in our last Number, and the rules at large being given in the Monthly Record for the present month. We shall, at the earliest opportunity, notice the changes which they will produce in the practice of the courts. For the present, we are desirous of bringing before the members of the profession some considerations materially affecting their interests, and on which there appears to be some misunderstanding.

Though we were at first disposed to think that the Judges had made a movement of unexampled celerity in law reform, and that they had not sufficiently considered the consequences of the alterations they proposed in several practical matters, we are, on mature deliberation, convinced that the course they have adopted is both necessary and judicious, particularly when we recollect that four of the number of those Judges from whom the rules proceed are members of the Common Law Commission. The alterations proposed form a part only of their plan, which is not wholly developed; and it cannot be doubted, when we look to the rules, that other and equally important alterations must follow, which, we trust, will set the profession right with the public; and whilst they purge the law proceedings from verbosity and technicality, will ensure to the profession that reward for their actual, laborious, and necessary duties, which the interest of all parties demands, and the Judges cannot therefore overlook.

Indeed, our first impression on perusing these rules was, that the Judges had scarcely done justice to the labours of the Common Law Commissioners, for though they have carried into effect several of their recommendations, we presume that the Commissioners would have preferred that all the parts of their plan of legal improvement should have been promulgated rather than before partial alterations founded thereon have been made.

We are, however, satisfied that there can be no intention on the part of the learned Judges, either to treat with disrespect the labours of the commissioners, or to do injustice to any branch of the practitioners of the law. There is at the present time an irresistible necessity for facilitating the administration of justice, for expediting the course of proceedings and for diminishing legal expenses. Our brethren, on reflection, will be satisfied that it is both to their honour and advantage that such changes as may be required should be cheerfully and willingly conceded; and that it is much better we should reform ourselves in those particulars which we can best point out, than leave the work of reform to those who will not conduct it with equal discretion, and who may do as much mischief as benefit in their indiscriminate career.

It is necessary, indeed, to show the legislature and the public that there is no indisposition in any part of the profession to concur, nay to assist, in improving the administration of justice and promoting the interests of the suitors wherever a change can be safely effected.

These measures of practical reform, carefully and judiciously made, in consistency with "the ancient ways of the constitution," we hold to be the right mode of correcting the evils which time has introduced, and effecting the alterations which a different state of things may render desirable. Wherever an actual abuse exists, let those who are best acquainted with it apply their minds to its remedy. A sweeping and general reform is always attended

with evil, but its effects are peculiarly mischievous when applied to the legal institutions of the country. Let us proceed step by step, weighing well the practical effect of each measure ere another be introduced. Let those best acquainted with the administration of the law exert themselves in its amelioration, and the public will soon receive all that they require.

We observe, by some letters which have appeared in the course of the past week in the columns of the daily press, that the Chief Justice of the King's Bench is described as displaying some exultation in destroying the emoluments of the special pleaders and common law practitioners. We believe no such feeling was exhibited; and we are assured there is every disposition on the part of the Judges to take into their attentive consideration the due remuneration of professional men; satisfied, as they must be, that unless their fees be adequate to the skill and services of respectable and well-educated persons, the profession will gradually decline in those qualities which are essential to the security of the public and the ends of justice.

The chief alterations, as they affect the costs of the profession in both its branches, are the abolition of several *motions of course*, and the *abridgment of pleadings* on bills of exchange, promissory notes, the money counts, &c.; but it will be observed that the rules are confined to these ordinary cases, and that in special actions no alteration has been made. Still, we are fully aware that some equivalent should be allowed to the practitioner in the mode of remuneration. We cannot doubt that when the law of costs shall be revised, as it must be, all these matters will be taken into consideration. It will be our business, from time to time, to bring the subject duly before the profession, and we are quite satisfied that ultimately the practitioner, as well as the suitor, will be benefited by the wholesome correction of long-prevailing abuses.

In concluding these remarks, we cannot but express our unmixed satisfaction, that the learned Judges have given their attention to the subject; as reform emanating from them must be doubly valuable to the profession and the public.

In our next number we shall set forth the principal advantages which we think will result from these regulations, and further advert to the important subject of costs. We have received some further important information, and several valuable hints, of which we could not avail ourselves on the present occasion.

MEDICAL JURISPRUDENCE.

No. III.

INFANCY — MISTAKEN IDENTITY — ALIBI — DE COMMORIENTIBUS.

We shall extract a portion of a lecture delivered by Professor Amos at the London University.* We are prevented from giving the whole, for the same reason which obliged us on a former occasion to curtail another of these lectures. We do not profess to be over-nice in these matters, but we cannot help thinking that the learned professor has been a little too free in his details. They may, perhaps, be suited to the profession for whose use these lectures are more peculiarly prepared; but we cannot see in what way the portions we have omitted are likely to benefit our own readers, while their insertion would probably excite displeasure.

"Rules of law were formerly laid down that a witness could not be admitted under the age of fourteen; then ten and nine were fixed upon. But these rules have yielded to the more enlightened experience of modern times, and are founded principally on the progress of education of young children. Accordingly, an infant of five years has been examined as a witness, and there is no fixed period by our law: it depends on the judge being satisfied that the child understands the obligation of an oath. The usual questions are, 'What becomes of good people when they die?' 'What becomes of people who tell lies?' In several instances, particularly where the clergy are not resident, I have known children of seven or eight, or more, not able to answer such questions. I have known more than one instance where a child has been asked, 'Where do good people go to when they die?' The child has answered, 'To the churchyard;' and all the judge could do, could not get the child to carry *good people* any *further*. In some cases a judge will put off a trial till another assizes, that a child, upon whom a rape has been committed, may be instructed in the nature of an oath; but this cannot be done after the jury are sworn.

"The English law, which is a medley of various systems—the feudal law, the civil law, the old Saxon law, the canon law, and other laws—prescribes a variety of ages of legal competency for different purposes. Thus, the power of making a will of lands, and of personal property, is fixed at different ages: one kind of guardianship ends at one age, another at another age: a person may be an executor at seventeen, a different age from any of the former periods. But I shall not have time this evening to speak of more than the age at which a person becomes punishable for the commission of crimes.†

"It appears that an infant between eight and nine has been executed for arson; an infant of

* See Medical Gazette, April 9. 1831.

† For the latest case illustrative of this subject, see 4 Car. & Pay. 236.

nine has been condemned for murder, where he concealed the body and the blood; a boy of ten was actually hanged for murder; a girl of thirteen has been burnt for killing her mistress The latest case of the conviction of a person of a very tender age for a capital offence occurred in 1748.*

"It seems to be generally agreed by writers on criminal law, that an infant under seven years of age cannot be guilty of felony, though there is an instance on record of a pardon to an infant under that age.

"Having taken this slight and transient view of medico-legal questions concerning *age*, I find that I must take an equally rapid and superficial sketch of the subject of *identity*. Instances have occurred of the most astonishing likenesses sometimes existing between persons wholly unconnected by blood. Some years ago, a Mr. Frank Douglas, a well known man of fashion, was committed for a highway robbery on the positive oath of the party plundered, and very narrowly escaped conviction: on the apprehension, however, of the notorious highwayman Page, the mystery was explained, the personal resemblance being so great as to deceive all ordinary observation. I might detain you a great part of the evening by relating cases of mistaken personal identity which have occurred in the English courts, in several of which the mistake has not been found out till after the execution of the person wrongly accused; and the foreign cases upon the same subject would occupy a lecture of themselves. But considering the limits of my time, I shall content myself with relating a case which passed under my own observation. The circumstance occurred at Warwick, this time last year. A man was indicted for burglary, accompanied with great violence and cruelty, and the prisoner's person was identified by the woman whose house was robbed, and who described particularly the clothes he had on. Being told that the prisoner's life depended on the evidence she was giving as to his identity, the witness turned round towards the box, and having surveyed the prisoner very deliberately for some minutes, said 'That is the man.' On this one of the principal officers of the Birmingham police said, that he thought she was mistaken; and that she had been deceived by the appearance of another prisoner, who had had sentence of death passed on him the day before for another burglary, very like this in its circumstances, and that he was led to think so, as well from the strong resemblance between the two persons as from the circumstance that the dress the woman described was precisely the dress of the other man; whereas the prisoner, who was a bad character, and had been for some time under the *surveillance* of the police, never wore such a dress. The other man was then produced in court, and the likeness appearing very remarkable, the jury acquitted the prisoner; though, at one period of the trial, nobody in court thought that there was the slightest chance of the prisoner escaping being executed.

"On the likeness of features, I might mention a case which occurred in Lincolnshire, where a person of fortune had come up from London to Grantham, and committed an unnatural offence with a linen-draper's apprentice; and the boy being detected in some other cases, turned king's evidence. But the London gentleman's name or residence was not known: he had presented the youth, however, with his picture; and a police officer, after watching in London a month or more, at length discovered him by the picture: his name was Arden. I remember seeing him tried. He was executed for the offence.

"The time will only allow me barely to allude to cases of controverted identity which are memorable in English history, such as that of Perkin Warbeck, in the reign of Henry VII., concerning whom the author of the Historic Doubts has raised so many ingenious arguments to show that he was, in fact, one of the princes alleged by the Lancastrian historians to have been smothered by Richard III. in the Tower. But, amongst a multitude of interesting cases occurring in courts of justice, I may mention that of Elizabeth Canning, where thirty-six witnesses spoke to the identity of a gipsy-woman of the name of Squires, and traced her all the way from Dorsetshire to London; whilst twenty-seven spoke to seeing her nearly every day during the same time in the immediate neighbourhood of Enfield, ten miles from London; and yet she was so remarkable a woman, that it was said of her, at the time, that the Almighty had not created her likeness. This case we shall have again to advert to in the course of the lectures. It was a case in which Elizabeth Canning charged Squires with confining her in a house at Enfield, and robbing her; and she deposed that she had subsisted in that house for twenty-nine days on a quartern loaf and a pitcher of water. There was no medical evidence as to the possibility of this point. The case is still one of mystery, as it never transpired where Elizabeth Canning was during the twenty-nine days, if she was not at Enfield; and when she came home, after being absent during that time, and almost famished to death, she described the room in which she had been confined, though it did not appear that she had ever been near the house or near the street before.

"Courts of justice are often imposed upon by alibis, where the witnesses for the alibi meet on a fixed day and hour, and agree to take particular notice of all the facts which then transpire; and thus they swear that the prisoner was along with them. For example: *A.* was robbed at twelve o'clock on Saturday; a party agree to meet next Saturday, at twelve, and they note every thing that passes, and then swear that the prisoner was one of the party. In such a case it is vain to order all the prisoners out of court, as is usually done when an alibi is in proof; the more you examine as to every trivial incident, the more the witnesses correspond. A year or two ago a gentleman in Nottinghamshire (I think his name was Thornton) was robbed, and swore positively to the

* 1 Russell on Crimes, 3. *ad fin.*

prisoner; but nevertheless the completest alibi was proved. The witnesses, examined separately, all spoke to the same minute circumstances transpiring whilst the prisoner was in their company on the day and hour of the robbery; and in particular that a church bell for funerals was tolling, which, in fact, tolled almost every day at that particular hour, when the robbery happened. The prisoner was acquitted. A year after this, Mr. Thornton seeing the prisoner in a little shop, went to him, and gave him his word that, as now all danger was over, if he would tell him the truth, no injury should happen to him, but the contrary. The man said, 'I did rob you; the alibi was concerted; I knew it was false; and when the jury turned round to consider the verdict, I felt a shuddering within me unlike any thing I had ever before felt or believed I could feel. The consequence was, that I vowed to get my bread in a different way for the future; and with this purpose have got into this little shop.'

"In several cases of alibi, it is a strong fact against that plea, that when the prisoner has been taken up, the alibi witnesses have not gone before the magistrate to exculpate their friend or relative.

"I remember one witness saying he knew the prisoner was in bed by his coughing; and Lord Wynford charitably suggested that this was so far from being proof of an alibi, that it raised the probability that the prisoner had been out of the house, and that the night air had made him cough.

"I must hasten to say a few words upon the subject of *survivorship*, which, like the subjects of age and identity, might well deserve a lecture for itself.

"It is a doctrine admitted in courts of law, that if a party has been absent for seven years beyond seas, and not heard of during all that time, he shall be presumed to be dead. This doctrine has been received in analogy to the statute of James, of Bigamy, which exempts from the penalties of bigamy persons whose husbands or wives have been absent for seven years. The presumption of death may arise within a shorter period, under circumstances; as where a person sailed for the West Indies two or three years before a trial, and it was proved that the ship had not been heard of, this was deemed sufficient presumptive evidence of that person's death.

"Among the more interesting cases of survivorship are those where several persons meet their deaths by the same calamity, and it becomes material, with reference to the rights of their surviving relatives, to determine which of them died first. Thus, when several persons are killed by the falling of the same building, an idea of survivorship may sometimes be deduced from an examination of the bodies, and of the relative situations in which they are found;—and when two persons have been drowned, besides the presumptions arising from the greater buoyancy of one body than the other, or from the knowledge that the one person was a swimmer and the other not, it has been thought by some medical writers that it may be proved by dissection whether death has supervened earlier in the one than in the other instance. Thus, too, in the interesting account which has been published of the sufferings of the Englishmen confined in the black-hole of Calcutta, there are many curious facts relative to survivorship: but the points I have just enumerated fall more particularly within the province of my colleague. I shall merely add, that in some of these cases of survivorship, especially where the bodies are not found, courts of justice have laid down several rules of law arising from the presumptions afforded by the age and sex of the parties. This is a considerable branch of the civil law, and is entitled '*de commorientibus*.'

"Two brothers, nearly of the same age, were lost the other day in the same vessel, in the Mediterranean. I have not been able to learn their respective ages, but the elder was in bad health; they had each left a considerable portion of their property to the other; and now a question arises between the wives and children of the two brothers, which of the two survived.

"One of the several remarkable cases on the subject in our books, is General Stanwix's case.

"'Gen. Stanwix, accompanied by his only child, a daughter by his first marriage, and by his second wife, set sail for Ireland; the vessel was lost, and not a single person escaped. If Gen. Stanwix had died a widower, and without issue living at the time of his death, that is to say, if his wife and daughter died before him, though but an instant, *his* nephew became his representative, and entitled to his personal estate; if the daughter was the survivor, then her personal representative (an uncle) was entitled; and on these claims the principal litigation took place; for though it is evident that the second wife also might have a separate next of kin, and her representative bring forward a distinct claim, the circumstance is not noticed by Fearne (Posth. Ws. p. 39.): 'the Court, finding the arguments on all sides equally solid and ingenious, waived giving any decision, and advised a compromise, to which the several claimants agreed.'

"The provisions of the *Code Napoleon* are to this effect:—

"In Art. 721, 722. it is laid down that, 'of persons under fifteen, the eldest shall be presumed to have survived; above sixty, the youngest; if some were under fifteen and others above sixty, the former are presumed to have survived; of persons between fifteen and sixty, males are presumed to have survived, the ages being equal, or where the difference does not exceed one year.'

"The following is an example out of the numerous cases which are mentioned in the writings of foreigners.

"'A father and son having perished at the battle of the Dunes, fought near Dunkirk in 1658, and the daughter and sister having at noon, on the very same day and hour, taken the vows in a nunnery, whereby she became *dead in law*, a question arose as to survivorship among these three persons, when it was decided that the nun died first, since her death, being

voluntary, was consummated in a moment; whereas that of the father and son, being violent, was probably not immediate. Between the father and son there did not appear to be any data for a just conclusion, and it was therefore decreed, according to the established rule above stated, that the son had survived the father.'

"I find this case in an old book of English reports. The title of a woman to recover dower was, the father and son were joint-tenants to them and the heirs of the son; and they were both hanged in one cart; but because the son, as deposed by witnesses, survived, which appeared by the shaking of his legs, the son's wife thereupon demanded dower, and the matter was found for her.' And cases sometimes occur in our courts of justice which depend not on the presumption of survivorship of two individuals, but on the particular moment of the death of one individual. I will exemplify this by a case which occurred at Warwick in the year 1805.

"'At the Lent assizes held at Warwick, in the year 1805, a cause was tried, in which a gentleman, who was insolvent, left his own house with the intention, as it was presumed from his preceding conduct and conversation, of destroying himself. Five weeks and four days after that period, his body was found floating down a river. The face was disfigured by putrefaction, and the hair separated from the scalp by the slightest pull; but the other parts of the body were firm and white, without any putrefactive appearance. The clothes were unaltered, but the linen was exceedingly rotten. On examining the body it was found that several parts of it were converted into *adipocire*. A commission of bankruptcy having been taken out against the deceased a few days *after* he had left his home, it became a question of great importance to the interests of his family to ascertain whether he was living at that period. From the changes which the body had sustained, it was presumed that he had drowned himself the day he left home; and to corroborate this presumption, the evidence of Dr. (now Sir George) Gibbs, of Bath, was required, as he had lately been engaged in experiments upon this subject. He stated on the trial, that he had procured a small quantity of this fatty substance by immersing the muscular parts of animals in water for a month, but that it required five or six weeks to produce it in any quantity. Upon this evidence the jury were of opinion that the deceased was *not alive* at the time the commission was taken out, and the bankruptcy was accordingly superseded.'"

COMPENSATION TO COMMISSIONERS OF BANKRUPTS.

We have expressed our opinion in favour of the bill for a reform in bankruptcy; but we have always coupled it with a compensation to the persons who now administer the present system. There is no instance that we can recollect, or which has been cited in the discussion, of the abolishing an office, and depriving its holder of the advantages he enjoyed under it, without giving him either another office or a compensation for the one which has been abolished. The benefit of this to the public (for it is there we derive any defence which we make for an existing institution) is obvious. No man capable of discharging the duties of an office would accept it, if he might be suddenly deprived of all its benefits at any time. He would rather devote his time and his energies to securing some competency, which could not thus be taken away from him. It has been the immemorial usage, we repeat, on the alteration of any office, to compensate its holders, even although the office were a sinecure. Now, in the present case, the duties of the commissioners were sufficiently onerous; they were discharged zealously, and not inefficiently; the offices were accepted with the understanding, that they were to be held as long as the holders pleased; and we therefore protest against the abolition of these offices without compensation.

The Bill is to be immediately introduced into the House of Commons, and will soon engage our attention.

ON THE REMEDY FOR TRESPASS BY DISTRESS "DAMAGE FEASANT."

The remedy by distress *damage feasant* appears now to be practically overlooked, and its summary efficacy not duly appreciated; though it certainly is extremely well calculated to suppress, without expense, trespasses by cattle, &c., in cases where the actual damage sustained is too inconsiderable, and the trespasses too frequently repeated, to justify having recourse, on each occasion, to the expensive and comparatively dilatory remedy in an action of trespass *quare clausum fregit*.

It has been said that a distress damage feasant is the strictest kind of distress, because "a number of rules must be observed in relation to the impounding and manner of treating the things distrained." Of necessity some rules must be observed; but it will be found that every possible latitude is allowed, consistent with the design of the proceeding — that the law on the subject is comprised within a small compass — the prescribed rules are founded in reason, and are equally intelligible to the distrainor and distrainee.

Indeed, it is rather to be expected that the proceedings should not be complicated, since the remedy is entirely a provision of the common law, which has always been regarded as the "perfection of reason," the result of "long study, observation, and experience, refined by learned men of all ages, the common birthright which the subject hath for the safeguard and defence, not only of his goods, lands, and revenues, but of his wife and children, body, fame, and life also." Co. Lit. 97, 142.

It may be observed,

1. That no warrant of distress damage feasant is required.

2. All things, capable of being damage feasant (not in use at the time), are liable to this distress; as goods improperly placed on another's soil, though not actually injuring the soil or its produce, but merely unlawfully encumbering it. Hence greyhounds, ferrets, and all animals *feræ naturæ*, may be taken damage feasant. *Athill* v. *Corbet*, Cro. Jac. 465. Com. Dig (B.) 4. This remedy might therefore have been conveniently resorted to, in order to restrain the mischievous "old hunter," mentioned *antè*, p. 17.; for though its owner replevied, it might, in case it leaped the fences and trespassed a second time, have been distrained again, each trespass being a new and distinct injury. F. N. B. 71. But as the things distrained are merely pledges, which cannot be sold, but only impounded until satisfaction be made for the injury done, perhaps, in the case of dogs or other worthless animals damage feasant, the owner might decline liberating them, and so this method might fail as the means of procuring satisfaction, though it would prevent future mischief.

The only strictness required, with regard to the thing distrained, is, that it must be damage feasant *at the time of the distress;* so that, if cattle were damage feasant yesterday, and again to-day, they can only be distrained for the damage they are doing when taken. Bull. N. P. 61. And if they are driven off before distress, they cannot be pursued. 12 Mod. 660, 661. And the distress must be confined to the thing which is doing the injury. Willes, 638. If, therefore, many cattle are damage feasant, *one* of them cannot be taken as a distress for the whole damage, though one may be distrained for its own damage, and the party injured may have an action of trespass for the damage done by the others. Willes, 638.

3. There is no restriction as to the time of taking the distress, providing only that it shall be damage feasant when taken. The law allows of this distress at any hour, either by night or by day; otherwise the beasts might escape before morning, or before they could be taken; in which respect this distress differs from that for rent or rent service, which must be made in the day time. Co. Lit. 142 a.

4. If a live distress of animals be impounded in a *common* pound overt, the owner is not entitled to any notice of it; he must take notice at his peril. But if they are put in a *special* pound overt, so constituted for this particular purpose, the distrainer must give notice to the owner. In both these cases, the owner, and not the distrainer, is bound to feed the beasts. But if they are put in a pound covert, as in a stable or the like, the distrainer must feed and sustain them; and he is not entitled to any satisfaction for the expense. Co. Lit. 47 b. If they are stolen from a pound overt, the distrainer is not answerable. But goods capable of being damaged by the weather, or of being easily carried away, ought to be impounded in a house or other enclosed place, to be kept safe and free from damage; for if they are put in a pound overt the distrainer is answerable for them. Co. Lit. 47 b.

5. If the distress should die in the pound, or escape from it, without the default of the distrainer, the action of trespass is restored; but the rule is, that having once distrained the action is gone. Salk. 248. In making this, as well as any other distress, the distrainer must use due caution; for improper driving or chasing he would subject himself to an action for damages. 3 Leon. 15.

6. The tender of amends before the distress maketh the distress unlawful, and after the distress, and before the impounding, the detainer unlawful; but tender after impounding comes too late to make either the taking or detaining unlawful, though the detainer may take the amends and let go the distress if he please. 2 Inst. 107. If the owner tender sufficient amends, yet he cannot take his beasts out of the pound if the amends be refused, but he must replevy (or bring trespass, but not case, *Anscomb* v. *Shore*, 1 Camp. 285.): and if it be found at the trial that the amends were insufficient, the distrainer shall have damages; if sufficient, the owner of the distress shall have damages. D. & St. 112. The tender should be made to the distrainer, and not to the bailiff or pound keeper. *Pilkington's* case, 5 Rep. 76. Cro. Eliz. 813.

7. Excepting the incidental operation of the 52 Hen. 3. c. 4. and 1 & 2 P. & M. c. 12., not one of the numerous (about sixteen) acts of Parliament regulating other distresses relates to a distress damage feasant. By the stat. of Hen. 3. *cattle distrained* shall be impounded in the county in which the distress was made. And by 1 & 2 P. & M., *no distress* of cattle shall be driven out of the hundred, &c. where it was made, except to a pound overt within the same shire, not above three miles distant from the place where the distress was taken, on pain of 100*s.* to the party grieved, and treble damages. By the common law, cattle in damage feasant might be impounded on the same land where taken (Noy, 135.); but it was not so as to other distresses previously to 11 Geo. 2. c. 19. § 10.

8. A pound-keeper is bound to receive every thing offered to his custody, and is not answerable for the legality of the distress. He must not let the cattle go, without replevin, or the consent of the distrainer. When the cattle are in the pound, they are *in custodio legis* (and cannot be taken in execution, Gilb. 40.); and if the pound be broken open, the distrainer, but not the pound-keeper, may bring an action, *Bodkin* v. *Powell and others*, M. 17 Geo. 3. B. R. Cowp. 476.

From this summary view of the subject, I think it sufficiently appears that every reasonable facility is afforded by the law in cases of damage feasant distress; and if this remedy, in lieu of trespass, were more frequently resorted to, we should not hear of so many trifling actions with their consequent verdicts for nominal damages.

For further information, the reader may refer to Bradby's Treatise on Distresses, c. 10., where, notwithstanding the subject is treated with

perspicuity, the whole law is comprised within nine pages. In Woodfall, Comyn, and Chambers, very little is said about it.

T. P.

REVIEW.

The whole Proceedings before the Presbytery of Dumbarton, and Synod of Glasgow and Ayr, in the Case of the Rev. John M'Leod Campbell, Minister of Row. Including the Libel, Answers to the Libel, Evidence, and Speeches. R. B. Lusk, Greenock. 1831.

We are surprised that the late trial of the Rev. Mr. Campbell for heresy has not excited more attention in this country. We confess, we think it not a little remarkable that such an event should have occurred in these times. We have had the peculiar opinions of Mr. Campbell explained to us; we have heard his imputed heresy pointed out; and we, doubtless in our ignorance of such matters, have been unable to understand in what way he differs from the tenets of the Scotch Church. The fundamental doctrines do not seem to have been impeached by him; and it appears to us, that it would have been wiser to have allowed him to pursue his course unmolested, than to have passed the solemn censure which has been passed on him. The trial appears to us so important, that we have printed it in our *Record* for this month.

We do not profess to enter into the controversial points of the dispute. They are discussed with great learning on both sides. Mr. Campbell is not the sole defender of his own opinions. They are zealously espoused by the Rev. Mr. Story of Roseneath, the Rev. Mr. Dunlop, the Rev. Mr. Wyllie of Carluke; and his counsel, Mr. Carlyle, does not content himself with stating the plain law of the case, but plunges at once into the depths of the theological controversy. With the exception of the general interest excited by the nature of the case, there is little in the proceedings to excite attention. There is a large mass of depositions, but it relates entirely to doctrinal points. We shall turn, therefore, to the speeches which were made on both sides, some of which display very considerable forensic tact and power.

The most interesting and important speeches were made before the Synod of Glasgow and Ayr. Managers were appointed by the Presbytery of Dumbarton, to defend their decree at the bar of the Synod. They were, Mr. Carr; Drs. Graham, Hamilton, Fleming, and Sym. Mr. Campbell's defence seems chiefly to have rested on himself; but if any aid were wanted, his counsel, Mr. Carlyle, and the Rev. Mr. Story, were ready to supply it. The address of Mr. Campbell to the Synod is of great interest. There are occasional passages in it of great eloquence. Take, as an example, the commencement:—

"I now appear at the bar of this very reverend Synod, as an appellant against a sentence of my Presbytery, finding relevant the major proposition of a libel against me. And I appear as an appellant against that sentence pronounced under certain circumstances; so that I have to engage your attention, not simply with a question of relevancy, as it came first to be discussed in the inferior Court, but with a sentence of the Presbytery passed upon the relevancy, *having certain materials for judging before them.* It is because of this feature in the character of the pleading to which I now ask your attention, that I feel it needful that the answers to the libel should have been fully read; seeing that these answers are not to be regarded by this Court as reasons of protest and appeal, but as part of the materials for judging with which the Presbytery was furnished, when they came to that sentence.

"And now, seeing that I may have to engage your attention for a considerable time, and that any impatience, on the part of those who hear me, might materially injure my cause, and affect the feelings with which they do listen, I would take this opportunity of entreating my brethren to bear with me, in consideration of the circumstances in which I stand before them — desiring to state whatever I may be made to feel it needful to state, as briefly and concisely as will be consistent with being understood.

"First of all, I would ask the indulgence of my brethren to myself personally, feeling that it is not too much to expect that what affects a brother will, even in that view, be acknowledged to have a claim on your attention. To myself, personally, I ask your indulgence, because it has come to pass, that my teaching, as a minister of the gospel of Christ, has been the subject of much discussion and comment, far and wide throughout the bounds of the Church, and has been either directly mentioned, or very pointedly alluded to, in many books which have issued from the press, having the name and authority of ministers of the Church — because, except in as far as my answers to the libel against me are concerned, I have not had the ear and attention of the Church to my own statement of that which I teach — and because I come here under the conviction that many gross and serious misconceptions of that which I teach have been widely circulated, and received by many in the land. Now, assuming that my brethren have been desirous to avoid every thing like prejudging a case that was likely to come before them, still I cannot know how far they have been able to keep themselves uninfluenced by what they have heard and read. I therefore ask your indulgence, as one who has now an opportunity of stating in your hearing, by his own lips, that

which he has been preaching in the district of the Church more particularly under your care. I ask your indulgence again, because coming here, not simply for the purpose of stating what I hold to be truth, but coming here as an accused and libelled person, I have not merely to deliver my character from misconception, but to deliver myself from the weight of a serious charge affecting my standing in the Church. But these, being personal considerations, are of comparatively little moment.

"I ask the attention of my fathers and brethren, in the next place, for their own sakes, that they may not judge in the dark — that they may not rashly do a thing which through eternity they may regret — because it is possible that even with a conscientious desire to give righteous judgment, they may judge precipitately, and so may judge unjustly; and because ignorance, although that of a conscientious man, is not an innocent thing in the sight of God, when a closer attention to the matter would have given clearer knowledge, and placed him in a better condition to judge.

"And I ask your attention, above all, for the sake of the truth of God. I am not here to contend about words — I am not here to contend about human dogmas; I am here to speak about that which I have taught my people, not as *my opinion* — for with my opinion I should never have felt myself warranted to have come to them — but which I have taught them with absolute confidence, as the truth of God. Therefore I ask especial attention, because the truth of God is concerned, and because the truth of God is exposed to suffer loss through the attention being diverted away from the truth itself to words."

A portion of the conclusion of his address is not less beautiful.

"I have fully set forth to my fathers and brethren the doctrines I have been teaching in the church of Row, and wherever else God has permitted me to speak in his name: and, on the subject of my appeals, I now again ask that you would come to this conclusion, that the major proposition of the libel is not relevant, and consequently that there is no occasion to consider the minor at all. And I do feel that it is not inconsistent with the place which you and I now occupy, that I should call upon you, fathers and brethren, in the name of the Lord Jesus Christ, who will soon judge you, that you sit in deliberation on this matter, as those who are not deciding on Confessions of Faith — as those who are not discharging a duty like that of lawyers seeking to apply acts of parliament; but as those who are called to pronounce whether certain doctrines are true or false — are in the word of God, or not in the word of God — as those, in other words, who are called to the high responsibility of judging that word, of which the Lord has said, that that word shall judge you in the last day. And, therefore, O let me entreat and beseech you, in the name of God, that you be found realising the awfulness of sitting in judgment not on Confessions of Faith, or acts of General Assemblies, but on the oracles of the living God. And O may God grant unto you all that, in the Spirit of Him who is to come and reveal the righteous judgment of God — in the Spirit of Christ the judge, by the power of his Spirit, you may now judge righteous judgment, and give a decision which may go to settle the troubled waters of men's minds in this district of the Church, and more especially in the parish of Row; and give a judgment to strengthen the hands of a servant of Christ, that his heart faint not; because of the opposition of ungodly and ignorant men, that he may be strengthened to confess the truth, through your acknowledging the truth of what he preaches."

This appears to us to show no small powers of mind, and to evince much good feeling. The effect must have been considerable on the Assembly to which it was addressed. Dr. Graham, who appears to have been the leading manager in support of the decree of the Presbytery, evidently felt the impression which had been made by Mr. Campbell. We think the commencement of his speech very judicious.

"We labour," said he, "under some disadvantage in appearing before you, inasmuch as the case now brought before this Reverend Court, by appeal from a sentence of our Presbytery, is one of a very difficult and delicate nature. It is a case of heresy; a kind of case which is generally regarded with suspicion, and is looked upon as discovering more zeal than prudence in those who bring it forward. But, Sir, had the charge against Mr. Campbell regarded matters purely speculative,— had it been, like some heresies, a mere strife of words, or had it regarded a point of trifling importance, not affecting the welfare of the Church, we should, in such a case, have never ventured to make a charge. Had Mr. Campbell merely adopted the sentiments of modern Millenarians, — had he ventured to determine the day, the year, or the century, when the millennium should commence, — had he taught, week after week, in the church of Row, that in less than a score of years our Saviour was to appear on earth, to select for his residence the land of Palestine, to restore the temple of Solomon in its primitive splendour, — had he merely taught that our blessed Saviour, thus enthroned in the temple, and surrounded by ten thousands of the saints, would bear rule on the earth,— we would have lamented that his time had been so unprofitably spent, but we would have declined any interference by the exercise of ecclesiastical authority.

"It was with much delay, and deep reluctance, that we took up the case at all. We did not forget the favourable impression that Mr. C. made upon us, at his first appearance among us. The fair talents that he displayed, and the good feeling that appeared in every part of his conduct, favourably impressed all classes, both rich and poor, clergy and laity. As a Presbytery, we did what we could to render his situation agreeable and comfortable. We gave him our best assistance to enlarge his church, and to build his manse; and the heritors being as willing as we were to meet his wishes, no situation can be conceived more favourable than that in

which he was settled. He was warmly supported by his Presbytery,—he was cordially esteemed by his people,—he was liberally encouraged by his heritors, and no man had a fairer prospect before him of public usefulness. But this fair prospect was soon blasted by his adoption of some religious novelties, and his revival of some exploded errors. As he was then free from that reserve which he sometime afterwards assumed, he frankly avowed on all occasions the opinions he had imbibed. He introduced them as subjects of discussion in societies, and announced them from the pulpit to his hearers. They were industriously circulated through a great part of the kingdom. The heresy speedily became widely known; and I may here say, that I do not mean to prejudge the case, when I speak of this as heresy.

"While Mr. Campbell was thus busily publishing his errors, we saw and pitied him. In his conversations with us, he maintained his principles zealously and perseveringly. In his discourses from the pulpit, he introduced them regularly, in spite of every remonstrance. The ministers who were accustomed to associate with him on sacramental occasions, intimated to him the uneasiness they felt from hearing his peculiar tenets propagated by him in their own parishes; and they proposed to him that, if he would abstain from preaching them in their pulpits, they would refrain from taking any notice of them. But, like all inventors of systems, he was not merely dogmatical, but dictatorial: he declared he would preach whatever the Spirit dictated to him; and we were obliged, in self-defence, to give up all intercourse with him in the way of preaching; and in this we were either preceded or followed by every clergyman in the Church, with the exception of one or two. While we thus showed our disapprobation of Mr. Campbell's principles, we gave no decided answer to the complaints that we received respecting the tenor of his preaching."

The plan adopted by the managers was similar to that employed by the eminent persons who conducted the impeachment of Warren Hastings. Each reverend gentleman took up one portion of the accusation, exhausted that point, and then referred to his brother who was to succeed him for the continuation of the address.

We shall here close our extracts. We regret that this trial has taken place. This is not the time, it appears to us, to dispute about the *minutiæ* of our faith. The Enemy of the Church is abroad, eager to avail himself of any intestine division to assail her possessions, to strip her of power, and desecrate her shrine. It is the duty of her members to stand united; to uphold the standard of her faith; to band together against the common foe; and, instead of quarrelling among themselves, to be ready and vigilant to ward off the attacks of those who approach like "thieves in the night."

THE UNIVERSITY OF LONDON.—LAW CLASS.

LECTURES OF MR. THEOBALD ON THE LAW OF PRINCIPAL AND SURETY.

No. VI.

(Continued.)

3. *Of Contribution.*

WHERE there are several sureties, and one of them has paid the whole debt, or more than his share would be on a proportionate division, he is entitled to call on the others for contribution; and may recover it in equity by bill, or at law by an action of *indebitatus assumpsit*.

The right of contribution was established first in equity only; and seems to spring from that sentiment of natural equity, which disapproves that one person should exclusively suffer from a demand to which others also are equally liable; or that one should exclusively sustain the burden of a payment, from which others, in common with him, have derived an equal benefit. And in conformity with this principle an equal apportionment of the sum paid by one surety more than has been paid by the other, so that the ultimate loss to each is the same, is the object of contribution in equity. If, therefore, all the sureties are solvent, an equal division of the whole debt, or of the sum paid by any one exceeding that paid by the others, ascertains the share to be contributed by each of the others; but if any of the sureties are insolvent, in equity such as are so are not reckoned, but the division is made among the remaining solvent sureties. Thus, where one of three sureties had paid the whole debt, he was allowed in equity a moiety for contribution from a co-surety, because the third was insolvent.* But at law the insolvency of a co-surety is not considered, and the one who has paid can recover from any co-surety no more than an aliquot part, regard being had to the number of the sureties only.† This division at law does not realise the principle and object of equity; for in case of the insolvency of any of the sureties. it leaves two shares to him who has paid; that is, his own share and that of the insolvent's, while the loss of only one share falls to the other solvent sureties.

Both at law and in equity, if a surety who seeks contribution has been reim-

* *Peter* v. *Rich*, 1 Cha. Ca. 34. *Hole* v. *Harrison*, 1 Cha. Ca. 246.

† *Cowell* v. *Edwards*, 2 Bos. & Pul. 268. *Browne* v. *Lee*, 6 Barn. & Cres. 697.

bursed part of his payment, whether by the debtor, or upon a counter-security, or by any other means, he must deduct the sum reimbursed, and is entitled to contribution on the balance. *

Before Mr. Theobald concluded this subject, he said he ought to advert to the case of *Ex parte Gifford* †, where Lord *Eldon* is reported to have delivered his judgment in terms which import a different rule of contribution from that which the lecturer stated. The case, said Mr. Theobald, was an application in bankruptcy, that the proof of a certain creditor against the estate of Niblock and Burgess might be expunged. Niblock and Burgess, the bankrupts, were sureties, together with one Baylis, in a promissory note for Bedford. The ground of the application was, that the creditors had accepted a composition of 4*s.* in the pound from Baylis, the other surety. The parts of the judgment to which, the lecturer said, he needed alone refer, were, first, the following general proposition; namely, "The principal," said Lord *Eldon*, "is to discharge all the obligations of all the sureties; but they stand with regard to each other in a relation, which gives this right, among others, that *if one pays more than his proportion, there shall be a contribution for a proportion of the excess beyond the proportion, which, in all events, he is to pay;*" and, secondly, the following remark, which explains the foregoing proposition, and applies it to the case under his Lordship's consideration:— "It might be prudent, in this very case, for Baylis (one of the sureties), Bedford's son-in-law, to say he would pay 4*s.*, recollecting that Niblock and Burgess (the other surety) must pay *more than ten shillings* before any demand could be made by them against Baylis." According to which, were the general rule as is implied, the right of contribution does not arise until one has paid more than his proportion; that is, if there are three sureties, it would not arise until one has paid a third; or if there are only two, until one has paid half the debt, and then he would be entitled to contribution for the excess only. Such a rule, however, Mr. Theobald observed, would be at variance with the principle of contribution, and he believed was warranted by no other case, and never was established.

As to the extent of the right of contribution, Mr. Theobald observed, that it extends not only to the debt, but to all expenses necessarily or reasonably incurred by the surety, in consequence of the default of the debtor. Thus, if the surety is sued, he is entitled to contribution for the expense of the writ; the putting the creditor to the necessity of issuing it being merely regarded as obliging him to demand payment in a legal and compulsory manner. But the surety is not entitled to contribution for the expenses of defending the action, because he might have prevented them by paying, and his defence was wrongful.‡

With respect to the kinds of sureties between whom the right of contribution takes place, Mr. Theobald said, that that right exists between all sureties of the same degree, whether they are engaged jointly or severally; and if severally, whether they are all engaged in one instrument, or by several instruments; and whether they have or have not a knowledge of one another's engagements. In illustration of this part of the subject the lecturer stated the case of *Deering* v. *Winchelsea.*§ — Thomas Deering, a younger brother of the plaintiff, had been appointed receiver of the fines and forfeitures of the customs of the outports; and he gave three bonds to the crown, each in the penalty of 4000*l.*, with a condition for duly accounting: in one of these bonds the plaintiff, in another Lord Winchelsea, and in the third Sir John Rous joined him as his sureties. Thomas Deering, the principal, became insolvent, and fled, indebted to the crown upwards of 6000*l.*, part of which was levied on his effects, and the residue the crown recovered of the plaintiff, whose present bill was filed for contribution from the two other sureties. And contribution was granted; for, as the *Lord Chief Baron* observed, in the course of an elaborate judgment, there being several bonds did not touch the principle of contribution, where all the obligees are bound as sureties for the same person; and his Lordship should have added, for the same debt.

But the liability to contribute may be prevented by stipulation. Thus, if where there are several sureties, and one of them stipulates to be liable only upon default of both the principal and the other sureties, those sureties are not entitled to contribution. This was decided in *Craythorne* v. *Swin-*

* *Knight* v. *Hughes*, 1 Moo. & Mal. N. P. C. 247. *Swain* v. *Wall*, 1 Cha. Ca. 149.

† 6 Vesey, 805.

‡ *Knight* v. *Hughes*, 1 Moo. & Mal. N. P. C 247.

§ 2 Bos. & Pul. 270.

*burne.** Sir John Swinburne, the defendant, was a surety in a separate bond to the bank of Newcastle for a sum of money advanced by the bank to Henry Swinburne his nephew; and the plaintiff was a surety for the same debt in another bond, to which Henry Swinburne was also a party.

The plaintiff had no knowledge of the defendant's engagement, and the condition of the defendant's bond was for payment of the debt, if Henry Swinburne and the plaintiff should not pay it.

Evidence was received from the bankers, that they understood it to be the intention of the defendant to be called upon only in the event of the default both of Henry Swinburne and the plaintiff. Henry Swinburne became insolvent and fled, and the plaintiff having paid the debt, filed a bill for contribution; but the *Lord Chancellor* dismissed the bill, contrary to the authority of an anonymous case in Freeman.

The sixth lecture, our sketch of which we have now concluded, was the last delivered by Mr. Theobald, in consequence of the return of Professor Amos from the circuit.

We understand it is Mr. Theobald's intention to convert the series into an essay, with a view to their publication, at about the close of the long vacation; and, in the next session of the University, it is probable that the learned Professor of English Law will avail himself of Mr. Theobald's assistance, to give a short course of lectures on special pleading, sketches of which we hope to present to our readers.

SUPERIOR COURTS.

LORD CHANCELLOR'S COURT.

EXPECTANT HEIR — LOAN.

Where goods are sold to an expectant heir at an apparently extravagant price, the vendor will be restrained from compelling payment for them at law until their real value is ascertained.

This was an appeal against an order of the *Vice Chancellor*. In 1828 the plaintiff applied to defendant to raise a sum of money; but he declined to have any dealings with him in the nature of a loan, but agreed to sell him plate and jewellery to the amount of 8000*l.* on receiving as security for the payment certain promissory notes and policies of insurance, a judgment in England and another in Ireland. Soon after the plaintiff obtained possession of the goods he wished to raise money on them, and they were actually sold by auction, and realised not quite 3000*l.* The *Vice Chancellor* had granted an injunction to restrain the defendant from proceeding at law, thinking that the *onus* lay on the defendant to prove that this transaction was not a loan, and from this decision the appeal was made.

The *Lord Chancellor* said that the court could not believe that this transaction was what it purported to be, a sale of plate. The case was, that a young man of 24, his father being alive, went to a jeweller who was known to deal in money as well as in goods; he made a proposition for a loan, but being unable to effect that, he resolves suddenly to deal with the defendant for plate and jewels, which he is said to have wanted for his wife. A person wanting to borrow 8000*l.*, buys 8000*l.* worth of jewels for his wife, and plate for his establishment, and yet he, the *Lord Chancellor*, was called upon to believe that the defendant did not know that this was more than a simple sale; the articles had evidently been sold at a great undervalue. He thought that the injunction must be continued to the hearing of the cause; then the full value of the property would be considered as well as the expenses which the defendant had sustained. The decree of the *Vice Chancellor* was, therefore, affirmed with costs. — *King* v. *Hamlet*, L. C. May 25. 1831.

VICE CHANCELLOR'S COURT.

INJUNCTION. — WASTE.

An injunction will be granted to stay the destruction of repairs agreed to be done, although the plaintiff had not performed all the stipulations on his part.

This was an application by Mr. *Lloyd* for an injunction. A lease had been granted of a house in Camberwell, by the ground landlord to the plaintiff, and he had agreed with the defendant to grant him an under-lease thereof, on condition that he should make certain repairs and improvements mentioned in the agreement; the plaintiff agreeing to reimburse him for the same. The defendant had completed a certain part of the repairs, and the plaintiff had paid all the sums which he was to pay according to his agreement, with the exception of one instalment, which was now due; and plaintiff declined to pay it until the defendant had performed the whole of his part of the agreement. The defendant now threatened, that if it was not paid, he would pull up the floors of the house, and destroy all the repairs he had already completed; and he had proceeded, and was now proceeding, to carry his threats into execution, which would render the house of no value whatever.

The *Vice Chancellor* granted the injunction. *Hasden* v. *Wood*, V. C. May 12. 1831.

COURT OF KING'S BENCH.

(Before the Four Judges.)

AFFIDAVIT OF DEBT. — ADMINISTRATION. — INTERPRETER. — ATTORNEY.

Where an affidavit of debt was sworn by an administrator, a Frenchman, and the jurat did not state that the interpreter understood

* 14 Vesey, 161.

the French and the English language; and the plaintiff's attorney acted as interpreter; and the process described the plaintiff as suing in his own right, and the affidavit stated the debt to be due in his representative character; and on search at the Prerogative Office, Doctors' Commons, but at no other ecclesiastical office, no letters of administration appeared to have been granted of the estate of the deceased to any one; but the jurat stated that the affidavit had been read over and explained to the deponent, in the French language, and that the interpreter was sworn upon his interpretation: Held, that the affidavit was sufficient, and the Court therefore refused to discharge the defendant out of custody on filing common bail.

In this case, the defendant was arrested on an affidavit of debt for 5000*l.* and upwards, claimed to be due from the defendant to the plaintiffs, as administrators of the deceased. The affidavit was sworn by the defendant at the Bill of Middlesex Office before Mr. Boddy, the proper officer there; Mr. Sloper, the plaintiff's attorney, having been first duly sworn to interpret the contents of the affidavit and the oath to the defendant, and the *jurat* stating that the affidavit had been read over and explained to the defendant in the French language by Mr. Sloper, and that the defendant was sworn upon his interpretation. A rule was obtained by Sir *James Scarlett*, calling upon the plaintiff to show cause why the defendant should not be discharged out of custody on filing common bail. This rule was obtained on an affidavit, which set out an office copy of the affidavit of debt, and bill of Middlesex, and which stated that search had been made at the Prerogative Office, and no letters of administration to the deceased could be found to have been granted, either to the plaintiffs or any other persons. Upon the whole of these facts four objections were taken on behalf of the defendant. First, that the *jurat* was insufficient in not stating that the interpreter had understood the French, and the English language. Secondly, that the plaintiff's attorney ought not to have been the interpreter. Thirdly, that the process was not warranted by the affidavit, the former describing the plaintiff as suing on their own right, without adding their representative character, and the latter disclosing a cause of action in their representative character only. Fourthly, that the plaintiffs did not appear to be administrators.

Barstow showed cause. The first objection as to the insufficiency of the *jurat* in not stating that the interpreter had understood the French and English language was answered by the case of *S. Bosc, Widow*, v. *N. A. Sollier*, 6 Dow. & Ryl. 514. which was also to be found reported in 4 Barn. & Cres. 358. In that case the *jurat* ran in a similar form, and Lord *Tenterden* in his judgment said, "I think the *jurat* is sufficiently certain to justify us in drawing the conclusion that the affidavit was duly sworn. It alleges, that the affidavit was interpreted to the deponent. Now that could not be, unless the deponent and the interpreter understood one and the same language. We must trust the certificate of our own officer, when he informs us, that the deponent was sworn to the truth of the affidavit. If that part of the *jurat*, which comes in by way of parenthesis, speaking of the interpreter, 'he having first sworn that he understood the *English* and *French* languages,' had been left out, still the *jurat* would have been sufficient. If it were necessary, however, to supply the alleged defect, it might be supplied by an affidavit stating the fact, that the plaintiff understood the language in which the oath and the affidavit of debt were interpreted. We must trust to our officer that he does not suffer a party to make an affidavit without taking care that the deponent understands what he swears." The other judges concurred, and the rule was discharged.

With regard to the second objection, that the affidavit of debt should not have been sworn before the paintiff's attorney, that was equally untenable. The rule of court prohibiting the swearing an affidavit before the plaintiff's attorney did not apply to the affidavit of debt. There was, in fact, an express rule of court allowing such an affidavit to be sworn before the plaintiff's attorney.* The third objection proceeded on a misapprehension of the rule as to process on which the plaintiff intends to sue in a representative character. The true construction of that rule was, that if the plaintiff sued out process in a limited character, he could not afterwards enlarge his right and declare in a general character. But if he sued out process in a general character, he might afterwards limit his right by declaring in some special or representative character. This distinction was recognised by the court in the case of *Ashworth* v. *Ryall*, 1 B. & A. 19. That case, for the present objection, was expressly in point. There, the plaintiff had sued out general process, and had declared specially, as administratrix, and the Court, upon an application by the bail, refused to enter an *exoneretur* on the bail piece. Then, with respect to the fourth objection, the Court never tried upon affidavit, whether a party was an administrator or not. But even if they would, the affidavit on the other side did not show enough to maintain this objection. Search appeared to have been made in the Prerogative Office, Doctors' Commons, and no administration there was found to have been taken out. That might be true, and yet the administration might have been a diocesan administration, or one issued out of the Prerogative Court of York. The plaintiffs might, therefore, be administrators, although the fact stated on the other side were true. On these grounds he submitted that the rule must be discharged.

Sir *James Scarlett, contrà*. The first objection was not answered by reference to the case which had been cited; because, there, it appeared that the interpreter sworn did understand the language in question. The second objection, certainly, could not be supported. The third objection was unanswered, inasmuch as the process was not supported by the affidavit of debt. In the case of *Ashworth* v. *Ryall*, the

* R. E. 15 Geo. 2. *reg.* 2. K. B.

question arose in a more advanced stage of the cause; namely, when the plaintiff had declared, in a representative character, after the defendant had been brought into court. The fourth objection might have been answered, in point of fact, if it were shown, that there was really a good administration; but the mere reasoning upon it, without the fact as the basis of the reasoning, was insufficient. The rule must, therefore, be made absolute.

Lord *Tenterden* C. J. I think none of the three remaining objections can prevail. The affidavit is the same in substance as in the case of *Bose* v. *Sollier*, and it appears to correspond with the form given in Tidd's Forms.* In those forms, I also observe that the form of the interpreter's oath is to be found; and we must give our own officer due credit for having properly discharged his duty in administering that oath. With regard to the objection, that the affidavit shows a cause of action in the representative character, and the process does not describe the plaintiff in that character, I think the case falls within the established rule, that the addition of the representative character is not necessary in the process. If, when the plaintiffs declare, they should set out a cause of action different from that which appears by the affidavit of debt, the defendant, or his bail, can apply to the Court for relief; but this is no objection to the process in its present form. As to the last objection, I think the defendant's affidavit does not go far enough, and that it was not necessary for the plaintiff to answer it. For aught that appears, the plaintiffs may be administrators, although letters of administration might not have been granted by the particular court in which the search was made. The rule must, therefore, be discharged; but, on account of the importance of the struggle between the parties, we do not think it a case in which it ought to be discharged with costs.

Rule discharged without costs. — *Marzetti* v. *Comte du Jouffroy*. E. T. May 2. 1831.

INFANCY. — WITNESS. — SURPRISE.

Where it appears on a trial of a plea of infancy, that the party to prove the infancy is one of the bail in the action, and consequently a verdict is found for the plaintiff, the Court will not grant a new trial on the ground of surprise.

Platt applied for a rule to show cause, why a verdict should not be set aside, and a new trial had, on the ground of surprise. It was an action on a bill of exchange, given by the defendant for goods sold and delivered to him, while carrying on trade. The defendant pleaded infancy. In support of this plea, the father and mother were called, and an examined copy of the register of birth produced. The examination was proved of the father. On cross-examination, it appeared that the father was bail in the action. A verdict was, of course, found for the plaintiff. This, however, was a surprise on the defendant, and he hoped that on that ground the defendant would be allowed to have a new trial.

Lord *Tenterden* C. J.—If a defendant thinks proper to carry on business, and hold himself out to the world and to his creditors as of age, when an action is brought against him to recover the amount of a debt which he honestly owes, he ought to look sharp, and ought not to let himself be so surprised.

Rule refused. — *Grimsby* v. *Billing*. T. T. May 25. 1831.

PRACTICE COURT.

PROCESS. — SERVICE. — MANDATE. — LATITAT.

In a county palatine the defendant should be served with the latitat, *and not with the mandate of the Chancellor.*

Miller had on a former day obtained a rule to show cause, why the service of the writ of *latitat* in this case, and subsequent proceedings thereon, should not be set aside with costs, and that in the mean time proceedings should be stayed.

Rowe, W. Carpenter, now showed cause. This rule was moved for on the ground of an alleged irregularity in the service of serviceable process in the county palatine of Lancaster, and much reliance had been placed on the case of the *Earl of Shrewsbury* v. *Haycroft*, 6 Bingham, 104. That case, however, was very cursorily reported, and no authorities were cited. It was there held, that the service of both process and mandate was necessary.

Taunton J. It does not follow, that had the decision been otherwise, the Court of Common Pleas must necessarily bind this court.

Rowe, W. C. The irregularity here complained of is the service of the *latitat* from this court, instead of a *mandate* from the Chancellor of the Duchy of Lancaster. This is a question of practice; and it will be found that that practice must entirely depend on the construction of the 5 Geo. 2. c. 27., being an act explanatory of the 12 Geo. 1. c. 29., which first made provision for serviceable process, and which provision, as there expressed, has been adopted by the subsequent acts of 19 Geo. 3. c. 70. § 2., and 7 & 8 Geo. 4. c. 71. By the first section of the statute of Geo. 2. the affidavit of the service of process, with a copy of which defendant is to be served, "is to be made before any *Judge or Commissioner* of the court out of which such process shall issue, authorised to take affidavits in such courts, and which affidavit is thereby directed to be filed *gratis*." On two grounds, the process here contemplated must have been the process out of the superior court. First, because such commissioner can only be appointed by one of the superior courts; secondly, because, if the affidavit were filed in the court of the county palatine, the affidavit could not subsequently be read, and proceedings taken on it, in this court; and, consequently, the effect of the original process would thus be evaded. The words of the act, moreover, are *such process*; and as the same process is described throughout the whole of it, the copy to be served must be evidently a copy of the process of this court.

It is true that in *Beacon* v. *Smith*, Mich. T. 1 Geo. 2., a different doctrine was held by the Common Pleas; but that decision was overruled by the same court, after the 5 Geo. 2., in

* Tidd's Forms, 74. (§ 1. b.) ed. 9.

the case of *Byers* and *Whitaker*, Barnes, 406. A case still more strongly in point is that of *Griffin* and *Alcock*, 2 Barnardistone, 399., which, after having been thrice considered, was at length decided in favour of the service of the *latitat*, in a most elaborate judgment by the Chief Justice of the King's Bench. For these reasons, therefore, the rule must be discharged.

Miller, contrà. Although it may be necessary to serve the *latitat*, it does not follow that it is not requisite to serve the mandate also. On the authority of the *Earl of Shrewsbury* v. *Haycroft*, it was necessary to have procured the mandate.

Taunton J. I am clearly of opinion, that the service of the *latitat* in this case was sufficient. The case in the Common Pleas appears to have been decided, without sufficiently adverting to the authorities. Those which have been produced here are both in point. In the one it was held, that the process from this court alone was sufficient; in the other, that a copy of that process might at once be served. The judgment, in the latter more especially, was given at length, and on mature consideration, by the Chief Justice of this court; and that judgment I am not prepared, on the authority of the case in the Common Pleas, to reverse. Then, as to serving both the *latitat* and the *mandate* of the Chancellor, there is this objection to that course. When the *latitat* is received, it is to be taken to the Chancellor's office, and filed there, in order to obtain a mandate. When it is filed there, how can it be served on the defendant? The rule must be discharged, but without costs, as perhaps the party was misled by the authority of the case in the Common Pleas.

Rule discharged without costs.* *Griffin* v. *Higgin*. E. T. May 4. 1831.

LANDLORD AND TENANT.

The recognisance required to be entered into by the tenant, under the 1 Geo. 4. c. 87. § 1., is taken at chambers after the rule has been obtained by motion in court. *Taunton* J.—*Anonymous*. E. T. May 5. 1831.

COURT OF COMMON PLEAS.

INSURANCE. — BARRATRY. — BLOCKADE.

The judgment of a foreign court, condemning a vessel for violating a blockade, must clearly set forth the fact on which the condemnation proceeded, or it will not be conclusive evidence of it.

The mere circumstance of a vessel being destined to a port in a state of blockade is not conclusive evidence of barratry, without some direct act of the captain clearly manifesting an intention to violate the blockade.

Assumpsit on a policy of insurance effected on the ship *George*, from London to Buenos Ayres, with liberty to call at Monte Video. Soon after, the vessel quitted England; and while it was on the voyage to the port of destination, the Brazilian authorities directed a blockade of Monte Video. The vessel, on arriving within sight of that port, was proceeding towards it, when the captain received information that the blockade had been established. He soon afterwards dropped anchor, and waited the coming up of some of the ships of the Brazilian squadron. By these ships his own vessel was taken possession of; and proceedings were afterwards instituted, on which the ship *George* was declared a prize, for having violated the blockade. The assured now claimed to recover on the policy, as for a total loss. The case was tried in London, before the Chief Justice, and the facts were afterwards turned into a special case for the opinion of the court.

Spankie Serjt. for the plaintiff, contended that the claim for a total loss had been fully made out. The ship was in the regular prosecution of the voyage, when it entered the port of Monte Video; and, if circumstances of no ordinary nature had not existed, would have been secured by the effect of the policy. The captain was ignorant of the blockade when he quitted England, and the question was, whether his entry into Monte Video was a legal deviation under such circumstances of ignorance?

Jones Serjt. contended, that the Captain must on his approach have seen that the port was blockaded, and he was not justified, at all events, on entering it, to see whether the blockade really existed or not. The plaintiff's right to recover was therefore gone.

Tindal C. J. observed, that the whole case depended on the question, whether the sentence of the foreign court was conclusive. If it was, there was an end to the claim on the policy. The question was one of some difficulty, and the Court would take time to consider the point.

Cur. adv. vult.

On the last day of the term,

Tindal C. J. delivered the judgment of the Court in this case. The question here was, whether the judgment of the Admiralty Court at *Monte Video* declaring the ship *George* a lawful prize was to be taken as conclusive evidence of the fact that the ship had become lawfully forfeited on account of the barratry of the captain. The ship had sailed on a voyage from *Liverpool* to *Buenos Ayres*, and had been captured by the Brazilian squadron while attempting to enter that place. The Court of Admiralty at *Monte Video* had condemned the ship as a lawful prize by a judgment which recited the nature of the voyage, the manner of the capture, and alleged that the voyage, as being directed to a port known to be blockaded, was illegal, and that the captain had violated the written regulations relating to such blockade. In consideration of these circumstances, the Court declared the ship to be a good prize; but its judgment rather afforded the inference that the captain

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* See 1 Tid. Prac. 168. In the subsequent part of the term, an application was made to the full Court in another case, the name of which we have not been able to obtain, to set aside service in a county palatine, on the ground that both *latitat* and *mandate* had been served, instead of the *latitat* only. On that occasion,

Lord *Tenterden* C. J. said, "The service of the *latitat* would have been sufficient, but the service of both must be unobjectionable."

had attempted to violate the blockade of *Buenos Ayres*, than made any distinct statement of the fact. The rule of law was perfectly clear as regarded the authority of foreign judgments in the courts of this country. That rule was, that such judgments should be conclusive as to the facts on which they were founded, provided those facts were fully and clearly set forth, as the foundation on which those judgments proceeded. The question was, whether that was the case here? The Court were of opinion that it was not; and besides this, that one of the grounds on which the foreign court had proceeded was one that could not be received as a cause for condemnation in the courts of law here. That ground was, the circumstance of the ship being originally destined for a port known to be under a blockade. Upon this point, the Court fully adopted the recent decision of the Court of King's Bench reported in 9 B. & C.*, where it was decided, that the fact of such a destination was not of itself a ground of condemnation for barratry, but the intention to violate the blockade must be manifested by some direct act of the captain. In the present case their Lordships were of opinion that no such intention had been manifested, but that, on the contrary, the manner in which the captain had conducted himself showed that he went towards *Buenos Ayres* in a state of ignorance, as to whether the blockade existed or not, and with the wish to gain information on that point, but with no determination to violate the blockade, if it should in reality be still continued. Under these circumstances, the Court would direct that judgment should be entered for the plaintiff.

Judgment for the plaintiff.—*Dalgleish* v. *Hodson*. H. T. May 9. 1831.

CIRCUITS OF THE JUDGES.

England and Wales.

SUMMER CIRCUIT, 1831.	Home.	Midland.	Norfolk.	Oxford.	Northern.	N. Wales & Chester	S. Wales & Chester.	Western.
	L. Tenterden J. Gaselee	L. C. Justice J. Littledale	L. Lyndhurst B. Garrow	J. Park J. Patteson	B. Vaughan J. J. Parke	B. Bolland	J. Bosanquet	J. Taunton J. Alderson
Satur. July 9	- -	- -	- -	Abingdon	York & City	- -	Cardiff	Winchester
Monday 11	- -	Northamp-	Buckingham	- -	- -	- -	- -	- -
Wednesday 13	Hertford	[ton	- -	Oxford	- -	- -	- -	- -
Thursday 14	- -	- -	Bedford	- -	- -	- -	- -	New Sarum
Friday 15	- -	Oakham	- -	- -	- -	- -	- -	- -
Saturday 16	- -	Lincoln and	Huntingdon	Worcester &	- -	- -	Carmarthen	- -
Monday 18	Chelmsford	[City	Cambridge	[City	- -	- -	[& Boro'	- -
Tuesday 19	- -	- -	- -	- -	- -	Welch Pool	- -	- -
Wednesday 20	- -	- -	- -	- -	- -	- -	- -	Dorchester
Thursday 21	- -	Nottingham	Bury St. Ed.	Stafford	- -	- -	- -	- -
Saturday 23	- -	[and Town	Norwich and	- -	Durham	Dolgelly	Haverford-	Exeter & city
Monday 25	Maidstone	- -	[City	- -	- -	- -	[west & Tn.	- -
Tuesday 26	- -	Derby	- -	- -	- -	- -	- -	- -
Wednesday 27	- -	- -	- -	- -	Northumb. &	Carnarvon	- -	- -
Thursday 28	- -	- -	- -	Shrewsbury	[Newc.	- -	- -	- -
Friday 29	- -	Leicester &	- -	- -	- -	- -	Cardigan	- -
Saturday 30	Lewes	[Boro'	- -	- -	- -	Beaumaris	- -	Bodmin
Mon. Aug. 1	- -	- -	- -	- -	Carlisle	- -	- -	- -
Tuesday 2	- -	- -	- -	Hereford	- -	- -	- -	- -
Wednesday 3	- -	Cov. & War.	- -	- -	- -	Ruthin	Brecon	- -
Thursday 4	Croydon	- -	- -	- -	- -	- -	- -	- -
Friday 5	- -	- -	- -	- -	Appleby	- -	- -	- -
Saturday 6	- -	- -	- -	Monmouth	- -	Mold	Presteign	Bridgewater
Monday 8	- -	- -	- -	- -	Lancaster	- -	- -	- -
Wednesday 10	- -	- -	- -	Glou. & City	- -	- -	- -	- -
Thursday 11	- -	- -	- -	- -	- -	Chester	Chester	- -
Saturday 13	- -	- -	- -	- -	- -	- -	- -	Bristol

ANSWERS TO QUERIES.

APPOINTMENT.

1. If the will itself contain no power of *exclusive* appointment (which it appears not to do), it is clear that the act of 1 W. 4. c. 47. will not authorise it. As the matter to be appointed is *land*, I think a portion of the *land* must be appointed. H. F. G.

2. I am of opinion, that the executors in this case cannot now make the proposed division of property. It would seem that the words, "upon her death, or second marriage," were intended to postpone the division until one or other of such events should happen; particularly, as it is uncertain amongst whom the property may then have to be divided, as in the event of the death of a son, *during the lifetime or widowhood of the wife*, the trustees or executors would certainly be responsible to the children of that son living at the death or marriage of the widow, and would therefore not now be effectually released by the parties proposed; and I think a court of equity would restrict a division until the happening of the event meditated by the testator.

N.

INFANT-NECESSARIES.

1. The general rule in the case of infants is, that they are liable for *actual* necessaries, as meat, drink, education, clothes, &c.; and on no other contracts. (Espinasse's Nisi Prius, 161.) There have been numerous cases decided as to what are to be considered actual necessaries; and if they have been found to be such, then it has always been laid down that the infant is liable.

But the law is different when an infant is *sub potestate parentis*, and living in the house with his

* *Naylor and Others* v. *Taylor*, 9 B. & C. 718.

parents; for it was held in *Bainbridge* v. *Pickering* (2 Bl. Rep. 1325.) that the infant would not then be liable even for necessaries. T. E.

2. This is too vaguely put to give a definite answer to. The responsibility or liability of the infant depends upon his situation with his parent. An infant is liable on a contract for necessaries living apart from his parent; but where the infant has been resident under his parent's roof, and supplied by the parent with what in his judgment was deemed necessary, it has been held that the infant in such case cannot bind himself to a stranger. See "Infancy," vol. i. p. 119. Sel. N. P., and the cases there cited. N.

3. This quære is answered in Monthly Record, p. 143. Your correspondent seems to think, by his use of the disjunctive "or," that if the infant were not liable, the parent necessarily is so: this is by no means the case, and I only notice it, as it is a common error.

H. F. G.

FORGING UNSTAMPED RECEIPTS.

1. In Hawkeswood's case, 1 Leach, 257., and 2 East, P. C. c. 19. § 45. p. 955., Mr. Justice Buller held, that the stamp acts were merely revenue laws, and did not purport in any way to alter the crime of forgery; and the prisoner was convicted of forging a bill of exchange on *unstamped* paper. The point was however saved; and the judges were *all* of opinion that the prisoner was properly convicted. This authority was afterwards acted upon in a similar case. 1 Leach, 258. note (*a*), and the prisoner was convicted and executed. And in a still later case (Morton's), 2 East, P. C. c. 19. § 45. p. 955.

C.

2. "It seems to be no way material whether a forged instrument be made in such a manner that if it were in truth such as it is counterfeited, it would be of validity or not." — Hawk. P. C. c. 70. § 7.

The stamp act is merely a revenue law. Forgery may be committed of a bill of exchange on unstamped paper. See 1 Leach, 257.; 2 East, P. C. 955. In this case all the judges held the prisoner properly convicted; for the stamp act only says that a bill without a stamp shall not be available to recover the debt; and, besides, it might be stamped after it was made. T. A.

QUERIES.

COSTS BEFORE ACTION.

If an attorney write a letter for a debt before commencing an action, and the party applied to should tender the amount of the debt only, and refuse to pay the costs of the letter, can such tender be legally refused, and an action maintained?

J. P.

COPYHOLD — EXPENSE OF ADMISSION.

A. mortgages his copyhold estate to *B.* *B.* dies, having made a will whereby he appointed *C.* and *D.* executors. *E.* becomes entitled to the estate as the heir at law of *B.* *A.* wishes to pay off his mortgage, and take a reconveyance of his estate from *E.* Must *A.* bear the expense of *E.* being admitted to this property, or are *B.*'s executors bound to bear such expense, as they will be entitled to receive the mortgage money?

STUDYING FOR THE BAR.

A gentleman, who is at present a practising attorney, desires to go to the bar, and to learn the shortest path for him to take, in order to arrive at his end with the least expense and loss of time?

R. Y.

JUDGMENT SIGNED AFTER DEATH OF ONE JOINT DEFENDANT.

A cognovit, after issue joined, was given by *A.* and *B.*, in Hilary vacation, 1829, to *C.*, payable the 6th May next ensuing, being the first day of Easter term. Before that day arrived, *A.* died; *C.*, not being aware of his death, signed judgment on the cognovit on the 8th May against *A.* and *B.*, but did not issue execution. Proceedings were dropped till 1831, and *C.* now wishes to proceed. He supposes he cannot act on the original judgment without reviving it, and doubts whether it can be revived, because irregularly signed. Can any correspondent suggest a method by which he can obtain a writ of execution?

G. H. T.

MISCELLANEA.

MASTERS EXTRAORDINARY.

THE creation of Masters Extraordinary by the Lord Chancellor sometimes puzzles the public a little. It is not generally known that any attorney may obtain this honour on procuring certain signatures and paying certain fees. We have often been amused by the blunders made on the subject:—"The Chancellor has been giving away two or three snug things, I see," was sagaciously observed to us the other day, on the appearance of three Masters Extraordinary in the Gazette. "The disposal of this species of patronage has, I understand, given great offence," it was further remarked. The remark reminded us of an attorney in Wales, who, on having his passport for France made out, designated himself as "Maitre Extraordinaire de la Cour de la Chancellerie;" and was treated with prodigious respect throughout that country in consequence.

DR. JOHNSON AND LORD THURLOW.

With Lord Thurlow, while he was at the bar, Johnson was well acquainted. He was often heard to say, "Thurlow is a man of such vigour of mind, that I never knew I was to meet him, but —I was going to say, I was afraid, but that would not be true, for I never was afraid of any man— but I never knew that I was to meet Thurlow, but I knew I had something to encounter."— *Murphy's Essay.*

The Legal Observer.

VOL. II. SATURDAY, JULY 2. 1831. No. XXXVI.

> ——— "Quod magis ad nos
> Pertinet, et nescire malum est, agitamus."
> HORAT.

THE COURSE OF LAW REFORM.

THE last parliament assembled with a strong feeling in favour of law reform. It listened attentively to all the numerous plans and suggestions which were made respecting it. The parliament which is just assembled is certainly not less inclined to attend to this subject. Its time will be principally engaged in the all-important topic which has now called it together; but probably occasions will be found, if not to pass the many bills which will be brought before the house for effecting law reform, at least to register an opinion on their merits.

It may be of service, therefore, to enquire into the course which this enquiry will probably take, and to what parts of the present system it will be directed. Being ourselves the steady friends of moderate law reform, we undertake this duty with the hope of assisting, and not of impeding, the legislature. It is too late to declare that our present system is perfect. Alterations must be made; and the only course left to the friends of things as they are, is to assist in a vigorous reform of the real and actual abuses in the laws, lest they provoke a universal clamour against the juridical institutions of the country.

Indeed, as far as we can learn or observe, there is an important change in the feelings of the profession on this subject. It used to be said that lawyers would never permit an alteration in their own department. However able, and willing, and eager to expose the defects in other parts of the constitution, they were united in the opposition to any reform in the law. "Touch a cobweb in Westminster Hall," said Burke, "and out comes the old spider." These, however, are certainly not the sentiments of the lawyer of the present day. He is willing to admit that a moderate reform is necessary. Far from opposing it, he is ready to assist it; and it is with these feelings that the present observations are made. We now intend to take a general survey of the changes which will probably be proposed, reserving to ourselves the particular consideration of each of them when it is brought forward in the House of Commons. We shall now merely ascend the height, and survey the country which we are approaching from the distance, but shall examine minutely each part of the prospect when we come nearest to it.

The reforms proposed in lunacy and in bankruptcy have been already sufficiently discussed in these pages. They will again be brought forward in some shape or other. The latter will, doubtless, provoke much discussion. The bill for effecting an alteration in the Court of Chancery will also be introduced. It is not expected that it will meet with much opposition.

We have, indeed, been confidently informed, that these measures will not be introduced in the present session. It is said that all the law Lords entertain opinions unfavourable to the bankruptcy bill; and that, incumbered as the present government is with the great measure of reform, Lord Grey is unwilling to bring forward another bill, which would certainly have to encounter a most serious opposition, if not a marked defeat. We merely state the current opinion on the subject. If the ultimate success of the bill is to be secured by the delay, we approve of it; we should, otherwise, sincerely regret it.

The measures recommended by the Real Property Commissioners, the nature of which we have also pointed out*, will, however, certainly engage the attention of the House. These are all the bills connected with law reform (with the exception of Lord Tenterden's acts) which were brought forward in the last parliament.

Indeed, the labours of that parliament are necessarily very unsatisfactory. In the three last Monthly Records we have printed the only six acts which are of any importance, that is to say, the act altering Sir James Scarlett's act for the Administration of Justice, the Mandamus Act, the act for the Examination of Witnesses, the Regency Act, the act for Speedy Judgment and Execution, and that for the Settlement of the

* See vol. i. L. O. p. 401.

Poor: and these are, in fact, the only results of the labours of the last parliament.

In the present parliament, however, or in that which will immediately succeed, we anticipate a long series of proposals for alterations in our laws.

The Common Law Commissioners have circulated among the profession questions touching the important subject of imprisonment for debt. These we have printed in two late Numbers *, and have opened our pages to a full consideration of the subject.†

Recent circumstances have called public attention to two important changes, which have before excited much discussion — the Usury Laws and our Criminal Code. We think that both these subjects deserve the earnest consideration of the legislature, and we are ourselves friendly to a change in both of them.

The latter reform, which will be soon introduced, will be for the amelioration of the Criminal Code. The House of Commons has already expressed a strong opinion on this subject, and we think the general feeling is in favour of the change. A portion of our criminal law has become almost useless from its over severity. We do not now stop to enquire whether certain crimes should or should not be punished with death; but if the negative of the proposition is so strongly impressed on prosecutors and juries, as in the one case to prevent prosecution, and in the other conviction, it appears to us that the time is come when an alteration of the law is necessary.

We do not, at present, enquire how far this should go; we merely think that the subject should receive the attentive consideration of the legislature; and we are glad, therefore, to see that Mr. Ewart has given notice of a motion on the subject for Tuesday the 12th of July.

There is one other subject that we think must also soon engage the attention of the legislature. We have opposed the measure of the present Lord Chancellor for the introduction of Local Courts, and we have, we think, given sufficient reasons for our opposition. We are, however, not prepared to say, that a measure may not be devised for the improvement of County Courts and the disposal of small actions: on the contrary, we think a measure of this kind absolutely necessary.

One of the most striking "signs of the times" is the determination manifested by the great legal authorities to come forward and apply themselves to the cause of law reform. The numerous acts and bills introduced into parliament by Lord Tenterden, Lord Wynford, &c. are proofs of this; and the new rules of practice evidence the same feeling.

These are the principal changes which are contemplated, and are, we think, sufficient for the present.

* *Antè*, p. 25. 73. † *Antè*, p. 97.

ON THE NEW RULES

FOR

THE REGULATION OF COMMON LAW PRACTICE.

We hastened, in our last Number, p. 113. *antè*, to express a *general* opinion on the propriety of these rules; and we proceed now to make some remarks in *detail* on the advantages that are likely to result from them.

We have already observed that the rules which have been pronounced form a part only of the recommendations of the Common-law Commissioners, for the completion of whose plan of improvement other important regulations are necessary, and especially the law of costs must be revised. It may be readily shown, that if these additional measures be not adopted, all that has yet been done will not only become nugatory but highly pernicious. We shall advert to the grounds of this conclusion hereafter, and for the present proceed to consider the several objects proposed to be effected by the rules in question.

1st. One of the principal advantages which may be anticipated to result from a series of regulations established by the Judges of *all* the common law courts is the *uniformity of practice* in those courts upon all the various subjects to which the rules relate. The benefits conferred by the alteration will be equally shared by the suitor and the practitioner; and we are persuaded that there is no respectable and intelligent member of the profession who does not rejoice at the change which has thus taken place. The points of difference in the practice of the several courts were most troublesome to the practitioners, creating dissension among themselves on useless points of form, and the petty costs of which were a poor compensation for perverted ingenuity or misapplied vigilance.

2d. The improvement in taking the recognisance of *bail* will be felt by all parties; by the defendant and the bail in the convenience of perfecting the proceeding at one attendance, and to the plaintiff in facilitating the enquiry into the sufficiency of the proposed bail, and preventing the delay occasioned by the former practice of putting in sham bail, — a practice the most disgraceful, and which, we trust, the alteration will effectually root out.

3d. The rule requiring the *particulars of demand* to be delivered with the declaration will save expense and avoid delay. It is to be regretted that the order does not extend to particulars of *set-off*, which, on the same principle, ought to be delivered with the notice or plea of set-off. The reason for requiring immediate information in the latter case is as strong as in the former. This should be amended.

4th. The abolition of the practice of *imparlance* must be universally approved. It was certainly absurd to give a defendant time to plead from one term to another, merely because the plaintiff had delayed the delivery of his declaration beyond a certain day.

It is questionable, however, on the construction of the rule, whether the practice as to imparlance does not still apply to cases where the writs have been returnable in a *preceding* term. If this be so, it is contrary to the spirit and intention of the order, and we presume will be amended.

5th. The immediate effect of requiring *four days' notice* to be given before signing judgment of *non pros*, will be the annihilation, in a considerable degree, of that branch of legal proceeding known familiarly by the name of "sharp practice," which produced nothing but animosity amongst the attorneys and expense to their clients, and which the variation of practice in the King's Bench from the other two courts often subjected even the most wary to annoyance and expense. Akin to this advantage is another, that of requiring *notice of the taxation of costs*, and on the whole we rejoice that there will be an end to the "snapping of judgments;" howbeit the costs of setting them aside are also to be seen no more.

6th. Amongst the ameliorations for the benefit of defendants is the rule which suspends the declaration until *six days after the service of process* or arrest, obviously with a view to enable a settlement of the action without incurring any other than the first expense. But in return for this boon to the *defendant* it is necessary the interests of the *plaintiff* should also be attended to.

We have received several letters on this part of the subject, from which we make the following extracts: —

"All writs should be made returnable on any day in the year, and the plaintiff be at liberty to declare at the return thereof and proceed to trial, through term and vacation. In the Marshalsea the proceedings go on regularly all the year, and the court sits every Friday for the trial of causes. In one or two cases in which I am engaged (says our correspondent) the debt and costs will be totally lost through the delay of proceeding till November next. I am sure it is not the wish of the profession that the learned Judges of the several courts should not have all proper relaxation from their laborious duties; but surely it would be no very difficult matter so to arrange, that one Judge might remain in town for despatching whatever business might arise; and also to sit weekly, or monthly, for the trial of causes. I am sure, if the Judges were aware of the great injury that is done to the profession and the public for want of such a regulation as this, they would not hesitate a moment in adopting it."

Another correspondent observes, "It is questionable whether that profound lawyer, Baron Wood, the father of special pleading, would have subscribed his name to the new rules lately promulgated by the Judges of the several courts, with an evident intention, no doubt, of lessening expences to suitors, and hastening the ends of justice; and with one exception, these objects, it is to be expected, will be accomplished. Yet, how it should have happened their Lordships made the following order seems somewhat unaccountable: — 'That no declaration *de bene esse* shall be delivered until the expiration of six days from the service of the process,' &c. Now, the consequence of this order will be this, that without there are at least *six* days to come in a term, *after* service of process or arrest, the plaintiff will seldom or ever be able to declare against a defendant during that term; for, if delay be the defendant's object, without he appears that term (which his attorney in that case would not advise him to do), the plaintiff is thrown over to the next term, and 'the law's delay' will be greatly increased."

On this subject we may observe, that if the recommendation of the Commissioners, to reduce the modes of bringing a defendant into court to a *summons* and a *capias*, be adopted, and that proceedings be then continued without reference to any prior or subsequent term, perhaps no objection will be made to the restriction of the declaration for six days; and we think there is some reason to expect such a change is contemplated.

7th. We come last to the *abridgment of pleadings* in ordinary cases, — the abolition of forms which have long occasioned reproach to the administration of justice; but we are satisfied that the result to the public of these improvements, which have been suggested by the reports of the Common-law Commissioners, will fail of their effect if the subject of *costs*, both between attorney and client, and party and party, and the expense of witnesses, extra costs, &c. be not taken into immediate consideration, and such changes made as the operation of the new rules render absolutely necessary. Indeed, our confidence in the framers of the regulations would lead us to conclude that the points we have re-

ferred to will not escape their due attention; and when we recollect that the Commissioners (many of whom have been elevated to the bench) have pledged themselves by their first report to enter into an enquiry on this important head, we cannot hesitate to believe that the earliest and best attention of all the Judges will be bestowed on the subject. We are given to understand, indeed, that the law of costs would have undergone a revision by the Commissioners at an early period; but their report on that branch of their enquiries has been unavoidably suspended until the law of *imprisonment for debt* and the law of *evidence* shall be examined. The Judges, however, having deemed it necessary to issue a series of rules which will materially affect the existing practice as to costs, it will be essential without delay that some alterations, correspondent with the nature and consequences of the rules, should be made by the time they are to take effect.

We are aware that some of the zealous members of the profession would, on all occasions, make a stand against any innovation by which the profits of the practitioner will be diminished; and this, we believe, by no means originates in a feeling for their own personal advantage, but for the sake of the public as well as the profession generally: for the change will not, of course, affect all branches of practice. Every one knows there may be a zeal without discretion; and we incline to think it is exhibited wherever there is an objection to an alteration manifestly consistent with the interests of justice. The truth is, that the public entertain the opinion very generally, that law is not only expensive, but its progress dilatory; and this is supported by the knowledge that the more diffuse the language of pleading, the more costly it is to the suitor; and whilst the labours which receive no immediate reward are thrown into the shade, the remuneration for business supposed only to be done is pressed into the foreground, and commented upon in unmeasured terms of reproach. This impression must be removed. It is absolutely essential to the well-being of the profession that the abuses complained of should be corrected.* Men abandon their legal rights when the cost and trouble of enforcing them exceed the benefit anticipated from litigation. Such a state of things operates as a denial of justice; and so long as it continues, the respectable practitioner will be the greatest sufferer in the diminution of the demand for his skill and exertions. We shall advert to this subject more fully at an early opportunity.

* The greater the facility given to a due understanding of the items of which a bill of costs is composed, the more the suitor will be satisfied with the charge.

THE LAW REFORMER.

No. I.

USURY LAWS.

To the Editor of the Legal Observer.

SIR,

I AM glad to find that you are not inattentive to the cause of law reform. You will permit me to say that you do not always go so far as I could wish; but, with some exceptions, I concur in the general views you take. I am induced now to call your attention, and that of your readers, to the subject of the usury laws. I have long been an advocate for their repeal; and the present seems a fit opportunity of recurring to the subject.

It is as a practical man that I object to the usury laws. I have had some opportunity of seeing their actual operation, and I am of opinion they bear most hardly on that class of persons whom they are intended to protect. If a man pressed for money could come openly into the market, and state his wants, his difficulties, and his chance of extricating himself from them by means of the desired loan — if he could thus lay all the circumstances of the case before the fair dealer — I am well satisfied that he would obtain money on much easier terms than he now does. All the circumstances of the case would be taken into consideration, the risk which is to be run would be ascertained, and the money would be lent for a sum to be returned proportionate to that risk. The fair borrower, who should of all others be protected, would not then be forced to have recourse to the professed money-lender or usurer; the cunning and mischievous devices now used, and which will be ever used, to evade the usury laws, would cease for ever; and an extensive system of fraud would be, if not entirely destroyed, at least considerably diminished. At present, as is well known, when the transaction is clearly usurious, the risk of discovery must be paid for. Say that a man wants to borrow 1000*l.*: he is introduced, or introduces himself, to a person willing, perhaps, to take his personal security. The 1000*l.* are lent; but in the first place 100*l.* or 200*l.* must be immediately returned as a consideration for the loan; then comes the ten or twelve *per cent.* on the whole 1000*l.* This, we know, occurs every day. Another plan is hardly less frequent. A person is

anxious to raise money, but can merely offer his note, or, at best, a bill accepted by another person, as a security. The lender at first questions this, but ultimately agrees to it, only he proposes that instead of money the borrower shall take goods; this is acceded to by the borrower, who must have the money. He gives the bills, and receives the goods, — ten pipes of one sort of wine, or 100 gross of nails, perhaps. These goods turn out to be just one third or one fourth of the value of the bills; yet this transaction has been decided to be not usurious.* But let us suppose that the borrower is in possession of property. If he has the absolute interest, his course is clear, he can sell or mortgage it for something like its worth; but suppose that he has only a life estate or interest in the property, this is not an estate which it is desirable to purchase either absolutely or conditionally. It is usual, therefore, in such cases, to borrow money on an annuity. By the plan commonly adopted, the usury laws are clearly evaded, and in a manner which is extremely burdensome on the borrower. In the first place, he has to pay interest in the form of an annuity at seven, eight, or nine *per cent.*, and he has also to pay the premiums for effecting an assurance upon his life to the amount of the sum borrowed. The lender runs no risk whatever; and frequently, after receiving his annuity for some years, assigns it for the sum originally advanced, or has it repurchased from him at that sum by the grantor. This is merely one transaction; but if, as is too often the case, a second annuity is resorted to, the expenses to the borrower become enormous. All the costs of the first transaction must be again defrayed; the deeds, always long, lengthen just in proportion to the incapacity of the property to endure them, and the estate at last sinks beneath the burden.

These, then, appear to me some of the evils of the present usury laws: they press most hardly on those they are intended to protect, and I am desirous, as a practical man, that they should be repealed.

I am, Sir,
Your most obedient servant,
A Law Reformer.

Lincoln's Inn, June 17. 1831.

PRACTICAL POINTS OF GENERAL INTEREST.

No. IV.

THE CHARACTER WHICH A MASTER MAY GIVE A SERVANT.

In an action by a servant for a libel in the form of a character, it is necessary to show implied malice, by directly negativing the charge, or express malice *aliunde*. It is no proof of express malice that the master has communicated to the party enquiring his belief as to misconduct after the plaintiff had quitted service, nor that he has made a similar communication to persons from whom he received the plaintiff with a good character.

Bayley J. It appears to me that the communication was privileged, and that the nonsuit is right. In the cases cited, the misconduct charged was negatived; whereby a foundation for inferring malice was raised. Here no evidence of malice is given *dehors* the supposed libel. It is said that Mrs. Affleck should not have stated that she was credibly informed that the plaintiff had misconducted herself after she left the defendant's service; but I think that there is not, upon the face of the letter, any malice. The defendant had received a good character of the plaintiff from her former mistress, and it is far from being a malicious act to make a communication which should have the effect of preventing the former character from being set up as the true one. If it had been proved that the plaintiff had conducted herself with perfect propriety during the whole period, there would have been a case to go to the jury.

Littledale J. I think that there was not sufficient evidence of malice. An injurious statement made in giving a character, though not true, is not actionable without proof of malice. It is said, that the latter part of the letter of the 1st of August shows malice; and that the defendant ought to have confined her statement to what took place in her own house. She certainly goes a little beyond that; but as she had been so credibly informed, it was part of her duty to communicate the information to Mrs. Seaman. It is also said that the term "disgraceful" in the letter implies malice; but the defendant was not compellable to enumerate the particular acts of misconduct upon which her opinion was founded; nor was she bound to name the person who communicated the information to her. Then, does what the defendant said on another occasion show malice? I think not. It does not appear that she went officiously for the purpose of making the statement to Mrs. K. The case would have been very different if the plaintiff had distinctly negatived the charge, and had shown that the defendant was actuated by malice.

Parke J. The rule laid down by Lord *Mansfield* in *Edmonson* v. *Stevenson* (Bull. N. P. 8.) is, that the gist of the acti

* See *Cook* v. *Caldecott*, 1 Moo. & Mal. 522.; and 1 L. O. p. 249.

must be malice, which should not be implied from the occasion of speaking, but should be directly proved. Then the question is, whether the plaintiff has produced evidence to lead to a conclusion that there was express malice? No inference of malice is to be raised from the letter itself. The defendant was perfectly justified in giving information as to facts which had occurred since the plaintiff had left service. There is no evidence of any representation made to any other persons than Jenkinson and Mrs. K.; and if the statements made to those persons had been officious communications, they would have been evidence from which the jury would have inferred malice. But the defendant had received characters both from Jenkinson and Mrs. K., and therefore she was perfectly justified in communicating her opinion to those persons. In *Rogers* v. *Clifton* (3 B. & P. 587.), there was evidence of good conduct negativing the defendant's charge, and the communication to Holland was officious. In *Blackburn* v. *Blackburn* (4 Bing. 395.), the communication was not in consequence of any enquiry. There it was properly left to the jury to say what really was the occasion of the writing of the letter; here the communication was *primâ facie* clearly privileged.

Lord *Tenterden* C. J. I entirely concur in what has fallen from my learned brothers. *Child* v. *Affleck*, 4 M. & R. 338.

AMENDMENT OF THE BANKRUPT LAWS.

ANALYSIS OF MR. FRESHFIELD'S BILL TO AMEND AN ACT OF THE SIXTH YEAR OF HIS LATE MAJESTY, FOR AMENDING THE LAWS RELATING TO BANKRUPTS.

It has been erroneously supposed, that this bill would interfere with the Lord Chancellor's plans of Reform in the *Administration* of the Bankrupt Laws; but it will be seen that its objects are to supply some important omissions in the general Bankrupt act relating to the inrolment of depositions and proceedings, and, under certain restrictions, rendering them evidence. Whether the old Courts are continued, or new Courts established, the law should be made as perfect as possible; and with this view, we think favourably of the present bill. We shall take an early opportunity of pointing out the evils it will remove. We understand that some opposition is intended to the measure; but we know not on what sufficient ground. It seems to us to present advantages founded on practical experience.

The bill recites that, whereas by an act passed in the sixth year of the reign of his late Majesty, intituled, "An Act to amend the Laws relating to Bankrupts," it is among other things enacted, that the Lord Chancellor may, upon petition, direct any depositions, proceedings, or other matter relating to commissions of bankruptcy, to be entered of record by a proper person to be appointed by the Lord Chancellor for that purpose, or by his deputy: and whereas the said act contains no provision for making such depositions or office copies of the record thereof evidence; It is therefore proposed to be enacted, that in case any person or persons by whom any deposition shall have been made under any commission of bankruptcy already issued or hereafter to be issued, relative to the trading or any act or acts of bankruptcy committed by any person or persons against whom such commission shall have issued, whether such deposition shall have been made before or after the declaration or adjudication of bankruptcy, shall die, or depart the realm, or become legally incapable of giving evidence of the matters or things, or any of them, contained or set forth in any such deposition, so far as relates to the trading of the person or persons, or any or either of the persons against whom such commission shall have issued, or to any act or acts of bankruptcy committed by him, her, or them, or any or either of them, then and in every such case such deposition, the same having been first duly entered of record pursuant to the said act, and having a certificate thereon to the effect set forth in the schedule hereunto annexed, purporting to be signed by the person for the time being appointed to enter of record depositions, proceedings or other matters relating to bankruptcy, pursuant to the said act, or his deputy, shall and may upon all occasions, without any proof of such signature, and without any proof of the signature of the person or persons by whom any such deposition was made, be given and received in evidence, to prove such commission and the trading and act or acts of bankruptcy of any person against whom such commission shall have issued, in any court of law or equity; and in case the commission, or the depositions or proceedings taken under the same, so entered of record pursuant to the said act, or any of them, shall be destroyed, lost or mislaid, then an office copy or office copies of the record of such commission, depositions or proceedings, or such of them as shall be so destroyed, lost or mislaid, signed by the person appointed to enter of record as aforesaid, or his deputy, shall and may upon all occasions, without any proof of the signature of the person so appointed to enter of record, or his deputy, be given and received as evidence to prove such commission, trading and act or acts of bankruptcy, in any court of law or equity, any law or custom to the contrary notwithstanding.

Provided, that if it shall be made appear, by evidence on oath, to the satisfaction of any Judge before whom any such deposition shall be offered in evidence, that the person or persons by whom the same shall have been made, hath or have departed the realm in order to *avoid cross examination or further examination*, in relation to the matters contained therein, that then and in such case it shall be competent to such Judge to receive or to reject such deposition, as in his discretion he may deem proper and just.

Provided, that all depositions, proceedings, or other matters relating to commissions of bankruptcy issued *before* the said act took effect, but directed to be inrolled, and *actually entered of record since* the taking effect of the said act, shall be deemed and taken to have been well and effectually entered of record, and shall have the same effect as if the same had been inrolled after the passing and under the authority of this act.

Provided, that the several provisions in the said act and in this act contained, relating to the power of the Lord Chancellor to direct any depositions, proceedings, or other matters relating to commissions of bankruptcy to be entered of record, and for making the same evidence, shall extend and apply to all commissions of bankruptcy issued *before*, in like manner as to all commissions of bankruptcy issued subsequently to the taking effect of the said act.

ON THE RIGHT OF ADVOCATES AND ATTORNEYS TO BE HEARD BEFORE JUSTICES OF THE PEACE.

It has been held, in a very recent case, that neither the accusing nor the accused party, before Justices of the Peace holding a Petty Sessions, have a right to insist upon having an attorney or advocate to assist them, although the matter before the Justices be a judicial proceeding, and although their decision may be final.

The important point involved in this doctrine induces us to select from our other reports, the case in which it was so determined, and we shall take leave, at an early opportunity, to discuss the subject; for we cannot concur in the propriety of the decision.

Declaration for trespass and assault. 1st plea, That the plaintiff, as an attorney, insisted upon being present and assisting as an attorney or advocate on behalf of an informer, in taking notes of the proceedings before the defendants, who were Justices hearing a complaint on information.* 2d plea. Similar to the first plea; but it alleged that the plaintiff insisted, as a matter of right, that he might be the attorney for the informer, and, *as such*, conduct the proceedings upon his behalf; but the defendants offered to allow him to stop as one of the public.

Demurrer to the two pleas.

Godson for the plaintiff said: These pleadings have been mutually agreed upon between the parties, to raise the question, whether or not the party accusing, as well as the party accused, have a right to the assistance of an advocate present before Justices of the Peace in Petty Sessions, to enable him to make out the charge. He cited *Rex* v. *the Justices of Staffordshire*, 1 Chit. Rep. 217.; *Rex* v. *Barron*, 3 Barn. & Ald. 432.; *Cox* v. *Coleridge*, 1 B. & C. 37., and 2 D. & R. 86., and *Danbury* v. *Cooper*, 10 B. & C. 237. He contended, that the infliction of a penalty being a judicial act, the Petty Sessions became *an open Court;* that there was not any distinction between *all* open Courts, and consequently, that the parties before Justices of the peace had the same right to have attorneys or advocates as the parties in the Court of King's Bench.

Justice, contrd, was stopped by the Court.

Lord *Tenterden* C. J. I think that the accused party before Justices of the peace, upon an information, has not a right to have an advocate present; much less has the accusing party that right. All courts of justice have immemorially regulated the proceedings of their own courts. A doctor in civil law asks leave before he can plead in this Court, and I believe that barristers at law ask leave before they speak in the ecclesiastical courts. In the Court of Common Pleas, no persons, except serjeants at law, are permitted to address the Judges. In some Courts of Quarter Sessions, it is still the practice for attorneys to conduct the case of their clients, and speak to the Court. I do not give any opinion as to the right of a person so far to assist, as to take notes of the proceedings. Whenever Justices of the peace are performing a judicial act, the place becomes an open Court, and every body has a right to be present, but not to interfere. On the argument respecting the inconvenience of not allowing advocates to conduct cases before magistrates, I think that it would be most inconvenient if such a right did exist.

Littledale J. I am of the same opinion.

Parke J. If the question before us was, whether a party had a right merely to take notes, I would ask for time before I decided that he could not. That is not the question, but whether an attorney can, as an advocate of a party, insist upon interfering in his behalf before the Justices sitting in Petty Sessions on a judicial act. I think that he cannot. The party and his attorney may communicate with each other in a respectful manner, but not so as to interfere with the Court. Barristers at law may plead in this Court as a right, because there has been a custom respecting it for many ages; but not so as to Courts formed of Justices of the peace.

Taunton J. concurred.

Judgment for the defendants.—*Collier, Gent., one, &c.* v. *Hicks and another*, T. T. June, 1831.

* It was an information upon the Stage Coach act, 50 Geo. 3. c. 48.

QUALIFICATION OF BAIL IN RESPECT OF FOREIGN PROPERTY.

As long as imprisonment for debt is permitted, and the intercourse between this and other countries is so continual and extensive, it is exceedingly important that the law with respect to the qualification or non-qualification of bail in respect of property abroad should be clearly settled; yet the law on this subject appears, according to the decisions, somewhat inconsistent. In some instances the Courts have admitted persons to justify in respect of property abroad. Thus, where one of the bail was a *Portuguese*, and owned a ship, which had for two years before traded between *Lon-*

don and *Portugal*, and was then gone to *Cadiz*, whence she was expected to return, and was insured in *London*, the Court of King's Bench permitted the bail to justify, although he did not swear to any effects in *England*. *Colson* v. *Carhordy*, T. 22 Geo. 3. K. B.; *Welsford's bail*, M. 57 Geo. 3. K. B.; 1 Chit. Rep. 286. *note*. So, also, bail was allowed to justify in respect of property consisting partly of cash and partly of a freehold house at *Gibraltar*. *Beardmore and others* v. *Phillips*, 4 M. & S. 173. This case was decided on the authority of *Christie* v. *Filleul*, 2 Black. Rep. 1323.

On the other hand, Mr. *Tidd* lays it down as a rule, that foreigners are not admitted to be bail, merely in respect of property abroad, which is not liable to the process of the Court. For this *dictum* he cites *Boddy* v. *Leyland*, 4 Burr. 2526, 2527.; two anonymous cases from Lofft, 34. 147.; *Wightwick* v. *Pickering*, Forest, 138.; and *Levy's bail*, 1 Chit. Rep. 285. But in *Smith* v. *Scandrett*, 1 W. Black. 444. the Court declared, that the circumstance of merely having no effects in England was not of itself a sufficient objection, without other auxiliary circumstances. In the note to *Levy's bail*, 1 Chit. Rep. 286., the following reasoning is adopted:—"With respect to a *British subject resident here*, it should seem, that the circumstance of his not having property in this country subject to the process of the Court constitutes no objection to his becoming bail, for otherwise a person who had property in the funds, which cannot be taken in execution, would not be sufficiently qualified; and any person, between the time of his becoming bail and his being fixed with the debt, might so dispose of his property, by investing it in the funds, or in copyhold, or sending it out of the kingdom, as to prevent any execution against it from being effectual. But as the plaintiff may, by pressing the bail when resident here, compel him to render his property available, such a subject resident here ought to be admitted as bail. But in the case of a *foreigner*, whose domicile is abroad, the circumstance of his property being out of the kingdom seems to constitute a reasonable objection."

In the case of *Graham* v. *Anderson*, 4 M. & S. 371., bail was permitted to justify, partly in respect of a landed estate in *Surinam*, and partly in respect of property in *England*. There, *Bayley* J. observed, "that the plaintiff might, by pressing the bail, compel him to render his property abroad available." But afterwards, on the same day, he added, "that he had looked into the cases, and that they were contradictory; and that it must not be taken for granted that a party can justify in respect of property abroad, when he has no other property." It would, however, be a great benefit that the decisions should no longer remain contradictory, as the consequences of bail being rejected for insufficiency of property are at all times so serious.

It is worthy of remark, that in all the cases where foreigners, or persons possessed of foreign property, have been admitted to justify, they were housekeepers. The keeping of a house in England appears to have always been regarded as indispensable: so much so, that a person lodging in *London*, though a housekeeper in *Scotland*, was not allowed to justify.* Now, this is a fallacious test of substantial property; for as the mere fact of the party being a housekeeper, whether he is a yearly, monthly, or weekly tenant, is enough to entitle him to justify, it is clear that the creditor gains but little by this requisite of good bail. The not keeping a house, therefore, seems a very inefficient objection to foreigners or other persons justifying as bail. Surely, "by pressing the bail," as Mr. Justice *Bayley* says†, the property abroad might be as well made available, when the bail is a lodger, as when he is a housekeeper at a weekly taking. It will, perhaps, be said, that this may be the case as to lodgers within the jurisdiction, who have no other place of abode; but cannot apply to the lodgers whose permanent place of residence is out of it. As a rule, the persons of the latter description are drawn hither by business, and are frequent visitants, and therefore easily amenable to the process of the *English* courts. There are some exceptions to that rule; as, for instance, where persons, permanently resident out of the jurisdiction of the *English* courts, pay a mere visit of pleasure to this country. In those cases, no doubt, the discretion of the judge before whom they proposed to justify, might be exerted for their rejection, and then no injury could accrue to the creditor.

Under all circumstances, since persons are allowed in some cases to justify in respect of property out of the jurisdiction, and the regulation with respect to bail being necessarily housekeepers affording little or no protection to creditors; and as, in general, persons who are lodgers in this country, but permanently resident out of it, are frequent visitants of this country, there appears no valid reason, as the law seems now to stand, for excluding them from that class of persons who may justify as bail.

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* 11 Price, 158. 2 L. O.

† *Graham* v. *Anderson*, 4 M. & S. 371.

NOTES OF THE WEEK.

PROCEEDINGS IN PARLIAMENT RELATING TO THE LAW.

REFERRING to the article on "The Course of Law Reform," in which a general view has been taken of the several measures in progress or anticipation, we subjoin the notices which have been given in the House of Commons since the assembly of the new Parliament, of the several bills already brought in, or intended to be moved, for the alteration of the law.

For 22d June, 1831.

Mr. *Freshfield:*—Bill to amend an act, 6 Geo. 4. for amending the laws relating to bankrupts.

23d June.

Sir *Edward Sugden:*—Bill for extending the provisions of the statute of frauds.

Sir *Edward Sugden:*—Bill for amending the law as to the attestation of instruments by which powers are executed.

28th June.

Mr. *O'Connell:*—Bill, better to secure the charitable donations and bequests of His Majesty's subjects in Great Britain professing the Roman catholic religion.

Mr. *Weyland:*—Bill to explain and amend the law of settlement by hiring and service.

29th June.

Mr. *Ayshford Sandford:*—Bill, remedying defects in the titles to lands allotted or taken in exchange under inclosure acts.

30th June.

Mr. *John Campbell:*—Bill to establish a general register of deeds, and other documents affecting real property in England and Wales.

Bill for the amendment of the law relating to inheritance.

Bill to amend the law relating to dower.

Bill to amend the law relating to the curtesy of England.

Bill to abolish fines and recoveries, and to substitute other assurances in lieu thereof.

Bill to amend the law relating to prescription, and the limitation of actions.

12th July.

Mr. *Ewart:*—Bill for abolishing the punishment of death in cases of sheep stealing, cattle stealing, and stealing in a dwelling house, no person being put in fear therein.

Mr. *Cripps:*—Bill for the regulation of the office of coroner.

DISPATCH OF BUSINESS IN CHANCERY.

On a motion to advance a bankrupt petition, made on Tuesday the 28th June, the Lord *Chancellor* declared his intention of disposing of all the bankrupt petitions set down in or before last Trinity Term.

LAW INSTITUTION.

The annual general Meeting of the members took place in the Hall of the Institution in Chancery Lane, on Tuesday the 28th of June. The Chair was taken by *J. W. Freshfield*, Esq. M. P., who ably described the advantages of the Institution, in relation not only to the interests and respectability of the members and the profession generally, but the essential security of the public, and the due and faithful administration of justice.

The Report of the Committee of Management was then read by the secretary; from which it appeared, that seventy-three new members had been elected in the past year, increasing the number to 704. Of the four calls, amounting to 40,000*l.*, it appeared that 248*l.* only remained uncollected. Several valuable donations had been made to the library during the year, and the Institution was expected to open in Michaelmas term; preparatory to which an application for a charter was recommended; and the Committee paid a deserved compliment to their architect, Mr. Vulliamy, for the science and skill with which he had planned and superintended the works of the Institution, and the zeal he had on all occasions shown for its interests.

The meeting was then addressed by Mr. Tooke, Mr. Sandys, Mr. Foss, Mr. Wilde, Mr. Dodd, Mr. W. S. Jones, Mr. Browne, Mr. Lythgoe, Mr. R. Arden, and other members; and various resolutions were unanimously carried, for the full detail of which, including the Report, we must refer to our next Monthly Record.

SUPERIOR COURTS.

ROLLS COURT.

CHARITY.—ACCOUNT.—PRACTICE.

A corporation will not be compelled to account for rents and profits of a charitable fund, further than from the time of filing the information, unless misconduct is proved against the existing members.

THIS was an information against the Stationers' Company, for the purpose of compelling the due application of the proceeds of certain property left to the Company for charitable purposes. No improper act was alleged against the present members of the corporation; but it was merely stated in the information, that they had followed the practice of their predecessors. The only point discussed in the argument was, whether the Company should account for the rents and profits of the lands from the time that the charitable fund had been misapplied, or only from the time of filing the information.

Mr. *Bickersteth*, in support of the information, said that a different practice prevailed in this court from that adopted by the Vice Chancellor, who had lately directed an account to be taken of the rents and profits from the time of the misapplication of the funds.

The *Master of the Rolls* said that it had always been the practice of the Court in which he presided, that when a corporation had merely acted as their predecessors had done, and there were no special circumstances of misconduct alleged against the present members of the corporation

to decree an account of the rents from the time of filing the information only. This had always been his practice; and however he might regret that he was obliged to differ from the Vice Chancellor, yet he felt himself compelled to abide by his own practice.—*Attorney General* v. *Stationers' Company.* M. R. May 26. 1831.

VICE CHANCELLOR'S COURT.

INJUNCTION.—LORD MAYOR'S COURT.

An injunction will be granted to restrain proceedings in the Lord Mayor's Court.

Mr. *Knight* applied for a special injunction under the following circumstances:—The plaintiffs are wine merchants, and a few years ago exported a large quantity of wine to India by His Majesty's ship Flora, then commanded by Captain Farren, giving him instructions to sell it on his arrival there. Captain Farren accordingly effected the sale, but a considerable time elapsed before the money was remitted to this country, as the house which had drawn the bill for the payment of the wine failed. However, a remittance was at last made to the defendants, Barber and Co., who were the agents and brokers of Captain Farren. That gentleman again went abroad, leaving a written direction in the hands of the defendants to divide all his money in their possession among his creditors, among whom the plaintiffs were included. The other defendants, Rudd and Co, who were only general creditors of Captain Farren, had issued an attachment in the Lord Mayor's Court on the whole property of Captain Farren in the hands of the defendants, Barber and Co., including the bill in question. The present application, therefore, was for an injunction to restrain the defendants, Barber and Co., from parting with the bill, and also to restrain the defendants, Rudd and Co. from prosecuting the attachment in the Lord Mayor's Court.

The *Vice-Chancellor* granted the injunction.—*Ullock and another* v. *Barker and others.* V. C. May 28.* 1831.

COURT OF KING'S BENCH.

(*Before the four Judges.*)

PLEADING.—AWARD.—DEMURRER.

In an action on an award, it is sufficient to allege, that the time for making the award was "duly" enlarged, by the indorsement of the arbitrator, and a judge's order.

A direction in an award for the payment of a sum of money by one party, and for the execution of mutual releases, is a sufficient settlement of all matters in difference, between the parties.

A direction in one part of an award to do an illegal, or impossible act, does not vitiate the rest of the award.

If an alternative, neither uncertain, illegal, nor impossible, of several acts which may be considered as uncertain, illegal, or impossible, is given by the direction of an award, the award is good, and the party ordered to perform that alternative is bound to perform it.

Assumpsit, on an Award.—The declaration stated, that differences having arisen between the plaintiff and defendant respecting certain bills of exchange, to which the plaintiff had put his name, without consideration, and which the defendant had negotiated, an action had been brought in this court in Easter term, 10 Geo. 4., by the plaintiff, against the defendant, to recover damages for his having so negotiated the said bills of exchange, and also for the recovery of the said bills, which action, together with all matters in difference between the parties, was referred by an order of Mr. Justice Littledale upon hearing the attorneys on both sides, and by their consent, to the arbitration of a learned sergeant, so that he made his award on or before a given day, or on or before such ulterior day as the said arbitrator, by an indorsement on the said order of reference, should name, and a judge of this court should order and appoint. The declaration further stated, that the said arbitrator having undertaken the reference, the time for making his award was duly enlarged by his endorsement, and by an order of Mr. Justice Littledale (both of which were made rules of this court), to an ulterior day; before which day the said arbitrator published his award, whereby it was ordered that the defendant should pay to the plaintiff, on or before a given day, the sum of ten shillings; that the defendant should deliver up to the plaintiff a certain bill of exchange for 300*l.*, or give him a bond of indemnity in the penal sum of 600*l.* to secure him against his liability on account of the said bill; that the defendant should pay to the plaintiff the further sum of 334*l.* 10*s.* between the hours of 12 and 2 o'clock on the above day, unless he (defendant) should, before the hour of noon on that day, pay and satisfy what remained due on a certain judgment theretofore recovered by Messrs. Tottie and Co. against the said defendant in an action brought by them, against the said plaintiff as drawer of a bill of exchange for 300*l.*, bearing date the — day of May, 1826, and drawn by the said defendant upon one C. N. to the order of the said defendant, and by him endorsed and paid away to the said Tottie and Co., and cause satisfaction to be entered on the roll in the said action, and likewise deliver up the said last-mentioned bill of exchange to the plaintiff; that the defendant should pay to the plaintiff the further sum of 545*l.*, unless (he) defendant should, in like manner, satisfy, &c. another judgment recorded by Stephen Hunter against the said defendant in an action brought by the said Hunter against the said plaintiff as acceptor of two bills of exchange for 250*l.* each, bearing date, &c., and deliver up the said last-mentioned bills; that the plaintiff should do all that might be necessary on his part to enable the defendant to enter satisfaction on the said judgment rolls; that the parties should execute mutual releases of all claims whatsoever; and that the defendant should pay the costs of the reference. (By the order of reference the costs of the cause were to abide the event of the award; and the costs of the reference were to be in the discretion of the arbitrator.) The declaration alleged for breaches the non-performance of all the things ordered by the award to be done by the defendant, and the non-payment of the costs, which had been

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* See *ante*, *Hopkins* v. *Newton*, 1 L. O. 415. S. P.

taxed by the proper officer. It also contained the other usual common counts.

The defendant pleaded,

1st. The general issue to the whole declaration.

2d. To the first count, that the judge's order of enlargement, and the order making it a rule of court, had not been drawn up on the hearing of the attorneys or the parties, or by consent, or upon reading the arbitrator's endorsement of enlargement; and that the said endorsement, or a copy of it, had never been served upon the defendant.

3d. That a certain bill of exchange drawn by the plaintiff on one C. N. for 300*l.*, bearing date the — day of May, 1826, and payable six months after date, and by the plaintiff endorsed and delivered to the defendant, was a matter in difference between the parties at the time of the reference, and was submitted to the consideration of the arbitrator, but he had not made any award concerning the same.

4th. That the arbitrator had made no award concerning the action that was pending between the parties.

5th. That certain judgments recovered by Tottie and Co., and by H. Turner, against the plaintiff, were matters in difference submitted to the arbitrator's consideration, and he had made no award concerning them.

6th. That there never were any judgments recovered by Tottie and Co., or by H. Turner, against the defendant, and therefore it was impossible to satisfy any such judgments.

7th. That defendant had no power to deliver up a bill of exchange which was in the hands of third parties, and, therefore, the award had ordered him, in this respect also, to do an impossible thing.

Issue joined on the 1st plea.

Demurrer to the 2d, 3d, 4th, 5th, 6th, and 7th pleas.

Miller in support of the demurrer. The 2d plea is bad for immateriality.

Lord *Tenterden* C. J. There is nothing in the 2d plea.

E. Lawes Serjt. It shows that the time for making the award was not duly enlarged, the judge's order having been drawn up without the consent of the parties.

Lord *Tenterden* C. J. There is an express consent in the original order of reference, and the time is enlarged in the precise mode there prescribed.

Miller next objected to the 3d plea:—1st, that it imputed misconduct to the arbitrator in making an award upon only some of the matters submitted to him, which was properly matter of application to the equitable jurisdiction of the court, and not pleadable, as coming within the principle of the cases founded on the statute of William, and not affected by the case of *Mitchell* v. *Staveley*, in 16 East, because there, the submission not having been made a rule of Court, the defendant had no other mode of availing himself of this objection than by a plea to the action. 2dly, the plea was bad, as contradicting the award, on the face of which, he contended, that this matter was disposed of in three different ways, namely, first, by the mutual releases, which would extinguish for ever any claim between these parties, which could possibly arise out of this bill of exchange; secondly, by disposing of the action, which the Court, looking at the recital in the declaration, and acting on the maxim that all reasonable intendment ought to be made in favour of awards, would presume comprised this amongst other matters in difference in that cause, and was, therefore, upon the authority of the case of *Pearse* v. *Pearse*, in 1 Strange, finally disposed of; and, thirdly, it was disposed of in specific terms, notwithstanding the words "drawn by the said defendant" were introduced into the award by an accidental clerical error, which the court would reject as being repugnant to the meaning of the context, and to the manifest intention of the arbitrator; the principle universally established by all the cases on this subject being, that where the Court can fairly perceive the intention of the arbitrator, although he uses language which, taken literally, expresses something different, they will so construe the award as to give effect to his real meaning, and uphold it accordingly. To the 4th plea he objected, that it also was bad, as contradicting the award; because, by ordering certain sums of money to be paid by one party to the other, and mutual releases to be executed, the arbitrator had finally disposed of the action. (This was conceded on the other side.) To the 5th plea, he urged objections similar to those urged to the 3d plea, and added, upon the authority of *Cayley* v. *Aickeson*, in 2 B. & C., and 13 Price, that as the judgments were recovered against the plaintiff, and he alone, therefore, was liable for the full amount, the awarding a sum of money from the defendant to the plaintiff was sufficient to dispose of them, as he would have to pay the remainder of their amount, and the execution of mutual releases would be a bar to any further liability in respect thereof, from one of these parties to the other. To the 6th and 7th pleas he objected, first, that professing to answer the whole of the first count which set forth the entire award, the plea only showed an excuse for not performing one of the things directed to be done, the impossibility or illegality of which would not vitiate the rest of the award; and, secondly, that as the defendant had the alternative, either to do the things there referred to, or pay a sum of money, the latter alternative being possible, he was bound to perform it, if the other was either impossible, or illegal, according to the authority of ——— v. *Elkins*, 12 Mod.; *Symmonds* v. *Swayne*, 1 Taunt., and other cases. Upon these grounds, he submitted, that the plaintiff was entitled to judgment upon those six pleas.

E. Lawes Serjt. *contrà*. As judgment upon any one of the pleas would be an answer to the award, he would confine his argument principally to the 3d and 5th pleas. The submission being conditional, namely, so that all the matters in difference between the parties were arbitrated upon, if any one of these were omitted, it vitiated the whole award. Here, the arbitrator had not disposed either of this bill of exchange or those judgments.

Parke J. These are the same intended to be described in the award, but misdescribed owing to a clerical error.

E. Lawes Serjt. Indeed, that was not the case; and, at all events, the Court were to take the allegations in the declaration as they found them. If they were the same, why did not the plaintiff allege that by way of replication? These matters, then, were not disposed of.

Lord *Tenterden* C. J. How can you get over the mutual releases?

E. Lawes Serjt. In the case of *Mitchell* v. *Staveley*, 16 East, where the Court held a similar plea to be good, mutual releases were ordered.

Lord *Tenterden* C. J. But they were not urged to the Court in answer to the objection.

E. Lawes Serjt. They were so urged, but Mr. East was then about going out to India, and in his hurry he omitted the greater part of the argument, which lasted two days, according to his report. Mutual releases never could settle one of these matters, at all events; for how could it prevent third persons from enforcing the judgments recovered by them?

Parke J. No; but as between these parties any claim or liability existing by one party to the other in respect of these judgments must have arisen upon some actual or supposed contract, and mutual releases would for ever bar that.

E. Lawes Serjt. That doctrine did not now prevail, and the case of *Mitchell* v. *Staveley* furnished an answer to it.

Lord *Tenterden* C. J. How will you get over the case of *Birks* v. *Trippett*, 1 Saund. 28 *a*.?

E. Lawes Serjt. That was the case of a direct debt, from one of the parties to the other: and, besides, the point was not argued, because the submission in that case was not conditional. Independently of mutual releases being no answer to these pleas, the whole award was uncertain on the face of it. It did not merely give simple alternatives, but it ordered one thing to be done at one time, or another thing to be done at a subsequent time; and so, if this were to be held good, an arbitrator might go on awarding a distinct alternative for every day in the year. And then it ordered the defendant to pay and satisfy what remained due on certain judgments, without ascertaining the amount; so that in this respect also it was uncertain. Upon all these grounds, he contended, that the award was uncertain and inconclusive, and that the defendant was entitled to judgment.

The *Court* were unanimously of opinion, that these pleas could not be sustained. The first of them, which was the 2d plea on the record, stated matter that was immaterial, because it appeared on the face of the record that the time was duly enlarged in the precise form prescribed by the order of reference, which was drawn up by consent of the attorneys on both sides. The 3d and 5th pleas were met by the direction to execute mutual releases, which would for ever be a bar to all claims founded upon any contracts, either actual or implied, between these parties, in respect of any liability from one to the other arising out of the bill of exchange or the judgments referred to in those two pleas; and upon this point, the case of *Birks* v. *Trippett*, in 1 Saund., was a direct authority; for there a demurrer was allowed upon precisely the same ground to a plea drawn up in similar terms. The 4th plea alleged, that the arbitrator had not put an end to the action; but upon referring to the award, it appeared that he directed the defendant to pay a sum of money to the plaintiff, and that the parties should execute mutual releases. It was clear, therefore, that the arbitrator did intend to put an end to the suit; and if it were hereafter proceeded with, this award, or a release executed in obedience to it, might be well pleaded *puis darrein continuance*, and would be a full answer to it. Then as to the 6th and 7th pleas, if the matters there referred to were either illegal or impossible to be done, still it was evident from the cases cited that they did not vitiate the rest of the award, and, consequently, these pleas were ill, as professing to be an answer to the entire count in which the whole of the award was set forth; and, moreover, as the defendant had an alternative allowed him, which was neither uncertain, illegal, nor impossible, namely the payment of a sum of money, he was clearly bound to perform the latter, if the other were out of his power. For these reasons they were of opinion, that upon the 2d, 3d, 4th, 5th, 6th, and 7th pleas there must be

Judgment for the plaintiff.

Wharton v. *King*, T. T. May 31. 1831.

ATTORNEY'S BILL WHEN TAXABLE.

A special agreement between an attorney and his client, as to the amount of the charges of the former, is not binding on the Master on taxation; but the Master may exercise his discretion, under all the circumstances of the case, and make an allowance, even to the amount stated in the special agreement.

Barstow moved for a rule to show cause, why certain bills, to the amount of 2500*l*., delivered by an attorney named Cory, to the plaintiff, by whom he had been employed, should not be referred to be taxed by the Master. There were five bills delivered. Three were paid by the plaintiff, Mr. Drax, without being referred to taxation. The object of the present application was, that those bills might be referred to the Master for taxation, and the Master might review his taxation of the two last. His objections to the Master's taxation were three. First, the Master allowed to Mr. Cory, in respect of all journeys taken by him, at the rate of five guineas a day, besides his expenses. The usual allowance was two guineas a day.

Taunton J. In that the Court cannot interfere; because, on the subject of those charges, he is is for common purposes the sole judge.

Barstow. I know that in general the Court do not interfere in matters of detail. But it is to the principle of the Master's taxation that I object. It is contended, and I may admit it, that a special agreement was made between Mr. Cory and Mr. Drax, that the former should be allowed five guineas a day, besides his expenses, for all journeys. But any agreement of that kind cannot be allowed in point of law. It is laid down by Mr. Tidd *, that "an attorney's bill may also be taxed, though there was a spe-

* 1 Tidd's Prac. 333. ed. 9.

cial agreement between the attorney and his client, that the former should be paid for his time at a certain rate by the day, besides his expenses."

Taunton J. Mr. Tidd only says, that the bill may be taxed; but he does not show what the rate of allowance was to be.

Barstow. Yes; but that must be in order to reduce it according to the usual rate. For it would be idle to send it to be taxed by the Master, if he is to be bound by the agreement. Now, the difference here from the usual rate of charge is two or three hundred pounds in the amount of those bills. It would be most mischievous, if an attorney, when a summons was taken out to tax his bill, should be able to say, before a judge at chambers, that there was a special agreement between him and his client, and therefore the Master could not interfere.

Taunton J. Then it would be open for the client to say that there was no such agreement. But here he allows that there was such an agreement.

Barstow. Then I must rest my argument on the authority of Mr. Tidd, that an attorney's bill may be referred to taxation, although a special agreement exists as to the amount of the attorney's remuneration; and as it would be of no advantage whatever that a bill should be referred to taxation, if the Master were to be bound by the special agreement, I submit it must be reduced according to the usual scale.

My second objection is, that there was a charge for perusing an abstract of a title nearly to the amount of 50*l.*; a copy for counsel 54*l.*; and fee to counsel and clerk 57*l.* 15*s.* Mr. Drax's objection to those charges is to the perusal by the attorney; for the title was not accepted on his responsibility, but on that of the counsel, with whose fees he was also charged. No responsibility, therefore, was incurred by him, but he transferred his responsibility to the counsel; Mr. Drax, therefore, had no advantage from the consideration bestowed by the attorney.

Taunton J. Yes, he had; because the attorney peruses it; and when he has perused it, he thinks that he ought to have the opinion of counsel. He would have been much more to blame if he had sent it at once to counsel for his opinion.

Barstow. Thirdly, he objected to the allowance by the Master of a copy of the abstract of title. His objection to this was twofold. First, he contended that the Master should not have allowed for the copy at all. Secondly, if a copy were allowed, he should have allowed the full amount of the copy, and not the stationer's charge for a copy only. With regard to the first point, the non-allowance of the copy at all, he should cite Sir *E. Sugden*'s book on Vendors and Purchasers, p. 586. Sir *Edward* had collected the cases there, and the conclusion he had drawn from them was this:—"As to the general property in the abstract, it is hard to say who may have it: while the contract is open it is neither in the vendor nor in the vendee absolutely; but if the sale goes on it is the property of the vendee; if the sale is broken off it is the property of the vendor. In the mean time the vendee has a temporary property, and a right to keep it, even if the title be rejected, until the dispute be finally settled, for his own justification, in order to show on what ground he did reject the title." Sir *Edward* then proceeded:—"In a case where a purchaser returned the abstract to the seller, to ask the queries and opinion of counsel, it was held, that he (the purchaser) might maintain *trover* against the seller for the abstract, although the seller himself might ultimately be entitled to the abstract. The temporary property of the purchaser in the abstract was sufficient to enable him to maintain the action." For this *dictum* he cited the case of *Roberts* v. *Wyatt*, 2 Taunt. 268. The property in the original abstract being in the vendee, his own client, it was not at all necessary for him to have a copy of the abstract. The Master should not, therefore, have allowed for a copy of it. But the Master had pursued a medium course, and had allowed a stationer's copy of the abstract. That brought him to the second branch of his third objection, which was, that he should either have allowed all or none.

His objections to the bill were therefore, first, that the special agreement was bad in point of law; secondly, that the charge for perusing by Mr. Cory, previous to sending it to counsel, ought not to have been allowed; and, thirdly, that the allowance of the copy of abstract was equally objectionable.

Taunton J. You may take a rule to show cause.

This rule was granted at the latter end of Easter term, and cause shown against it in Trinity term, before Mr. Justice Patteson in the Practice Court. He took time to consider, and the result was, that he stated his having had communication with the other judges of the King's Bench; and they were of opinion, that the question, whether a special agreement by a client to pay at a certain rate would bind the Master on taxation, was of so much importance, that the case ought to be argued before the full Court. On Tuesday the 24th of May,

Follett showed cause against the rule. He understood that Mr. *Barstow* had abandoned his objections to any other parts of the bill, except those which depended on the special agreement between Mr. Drax and Mr. Cory.

Barstow admitted, that the sole question between him and his learned friend was as to the special agreement.

Follett. He should not contend that an agreement between the client and the attorney would bind the master in the charges he should allow on taxation. But he should submit, that under the special circumstances of this case, the allowance made by the Master was perfectly correct. It was true that the Master generally allowed only two guineas a day to the attorney while engaged on journeys. That, however, did not prevent the Master from making any allowance, even to the amount of five guineas a day, if he thought proper. The whole of such matters were for the Master's discretion; and as there was no proof that his discretion had been controlled by the special agreement between the

attorney and his client, there was no reason for disturbing the taxation of the master.

Barstow contrà. Allowing that there was an agreement between Mr. Drax and Mr. Cory, that the latter should receive five guineas instead of two guineas a day, the case stands thus. A person, ignorant of law charges, is a client to an attorney. The client says, "What are your charges? I do not like to employ any one, unless I know what I have to pay." The attorney tells him what are *his* charges. But does he inform the client that *he* charges at a higher rate than others? Does he say, "Sir, I cannot give my attention for the same remuneration as others will. I must have *five* guineas a day; but the regular charge is *two* guineas?" He does not. Not a word passes, from which, the client may not suppose, that the charges stated to him are the regular charges. The client goes on, relying entirely on the honour of the attorney, not knowing whether the charges are regular or not. Now, is this such a special agreement between attorney and client as the Court, in favour of the attorney, will countenance? I submit, that no attorney can be allowed to set up such an agreement to prevent his bill from being taxed. I submit, that no attorney ought to make such an agreement. It is illegal. I need not remind the Court of the very proper jealousy shown by all the Courts, of all contracts, between attorney and client, for the benefit of the former. In the Courts of Equity the solicitor must not take a gift from his client, nor make a purchase from him.* If this were not so, there would be no bounds to the influence of an attorney. Could such a contract be allowed, it would be set up every day. When a party came to a judge's chambers, to apply for a summons to tax costs, the attorney would say, "You cannot tax, because there is a special agreement between my client and myself." If an attorney has received money from his client, he may say, "I have a bill to equal amount, by reason of a special agreement." And the Court can lay down no rule, can fix on no arbitrary sum, which shall be considered evidence of fraud by the attorney upon the client. Will the Court then enter into an enquiry in each particular case, as to whether the defendant did or did not exercise undue influence in procuring such an agreement. That would be a material question in almost every case. But, should the agreement itself be disputed, how will its existence be tried? By affidavit in the Master's office, or by issue? These are questions worthy of consideration, when so novel and so monstrous a doctrine is advanced. But how does the act of parliament 2 Geo. 2. c. 23. admit of this? That statute must now have an implied qualification. The language of it must now be, "shall deliver a bill" (if there be no special agreement to the contrary). Then upon the trial at *nisi prius*, instead of proof of delivery of a signed bill, proof will be given of a special agreement. It will, in fact, be almost a repeal of the act of parliament. But, on what foundation does this doctrine rest? Mr. Tidd † lays it down, that "an attorney's bill may be taxed, though there was a special agreement between the attorney and his client for his time, at a certain rate by the day, besides his expenses." For this *dictum* he cites Sayer on Costs, 321.; and 4 Brown's Chancery Cases, 350. And then he adds in his note a case in Barnardiston *contrà*. That case is to be found in 2 Barnardiston, 164., Trinity 5 Geo. 2., 1732, and is anonymous. The case was this:—"In an action brought by an attorney for fifty guineas, upon a special promise of the defendant, for business done in his profession, Mr. Hussey moved that it might be referred to the Master to see what was due, and upon paying the same, all proceedings might be stayed. The Court said, as this action was founded upon a special agreement, they could do nothing in it. Accordingly, the motion was refused." In this case, the bill might have been incurred before the act of 2 Geo. 2. c. 23. was passed; for there is no date in the case to ascertain at what time it was incurred, and there is no allusion made to the statute. But, in the case of *Walmesly* v. *Booth*, 2 Atk. 27., 1741, Lord *Hardwicke* observed, "Attorneys and solicitors, especially since the late act of parliament, 2 Geo. 2. c. 23., have been considered as officers of justice, and they have stated fees allotted to them, which they ought not to exceed; and therefore in all courts, but more especially in courts of law, there are certain rules for regulating their behaviour with regard to their clients." In *Newman* v. *Payne*‡, which was decided while Lord *Loughborough* was Chancellor, the marginal note is this:—"An attorney cannot take from his client a bond for unliquidated costs. Notwithstanding such bond and a mortgage have been given, the bills may be taxed, and upon payment, the defendant is bound to re-deliver, and the bond be declared void." Lord *Loughborough* said, "Bills of costs cannot be of an arbitrary amount, but must be such as are liable to be ascertained. They cannot be so settled as not to be open to examination." In the anonymous case quoted by Mr. Tidd, from Mr. Sergeant Sayer's book on Costs, p. 321., 52 Geo. 2., it appeared that an attorney having agreed with his client to be paid for his time at a certain rate by the day, and likewise to be allowed the expence of a post-chaise, the question was, whether the client should be bound by the agreement? It was holden, that he should not; and the attorney's bill, in which there were charges conformable to the agreement, was referred to be taxed." In the case of *Balme* v. *Pater*, Jacobs's Reports, 305., a party liable under a bond of indemnity for the costs of another had, on a compromise, paid what the solicitor stated to be the amount of them. He applied afterwards, although he was *not* the *client*, to have those costs taxed. Lord *Eldon* said, "There is nothing that ought to be granted with so much jealousy as the right of the suitors to have their bills of costs taxed. At the time of the agreement, the defendant had

* *Watt* v. *Grove*, 2 Sch. & Lef. 503. *Harris* v. *Tremenheere*, 15 Ves. 40, 41 *Montesquieu* v. *Sandys*, 18 Ves. 308. 313. *Bellew* v. *Russell*, 1 Ba. & Bea. 105. See also 1 Hovenden on Frauds, 28, 29.

† 1 Prac. 333. ed. 9.

‡ 4 Bro. C. C. 350. 2 Ves. jun. 199.

a right to have the bills taxed, and it is interposed as one of the terms upon which the suit was to be terminated, that they should not be taxed. Now, I am of opinion, that such a condition is good for nothing. The Court will not permit a party to say that the suit shall not be put an end to unless the other agrees not to tax the bill of the solicitor." In *Scougall* v. *Campbell*, 3 Russ. 545., the bills had been paid, and after a delay of some time an application was made to tax them. Lord *Eldon* C. there observed, "In reference to a topic which has been alluded to in the argument, I will say, that if any solicitor tells a client, beforehand, that he will not undertake his business if his bill is to be taxed, or if any solicitor, in the progress of a cause, gives his client to understand that he will go on with it, or not go on with it, according as his bills are to be taxed or not to be taxed, I think it my duty to say, that the judges of the land will not permit him to be a solicitor in any other cause. I do not believe that any judge would allow a solicitor who had so acted to continue on the roll, and I will not permit it to be intimated, that a solicitor will act, if his bills are not to be taxed, but will not act, if they are to be taxed."

I shall submit that the agreement was illegal, as being contrary to the act of parliament, and contrary to the authorities. But it requires no authority to show that no attorney ought to make such an agreement, or seek to make it. For every received principle of our law is against a state of things, which would operate as a strong temptation to an attorney to abandon his duty, in the commencement of his office, by driving a bargain which he might wring up to any amount according to the necessity or urgency of his client's situation.

Lord *Tenterden* C. J. An agreement, between a client and his attorney, on the subject of costs, would not be binding on the former. And if it were sworn here that the Master, in taxing the bills, considered himself bound by the agreement, I should have thought that he ought to have reviewed his taxation. There is, however, no affidavit to that effect. The Master has a right to exercise his discretion in matters of detail, under all the circumstances of each case; and if he has acted here according to his discretion, I see nothing in the facts laid before the Court, which should induce us to interfere, to make him review what he has done.

Littledale J. As a general principle, I don't think effect ought to be given to these agreements, between attorney and client. But it is open to the Master to enquire into the particular circumstances of the case, and to say what he ought to allow.

Parke J. It appears to me that agreements of this sort ought to be viewed by the Court with very great jealousy. But as it does not appear that the Master thought himself bound by the agreement, but that he exercised his discretion as to the amount of charges he ought to allow, I think we ought not to interfere.

Taunton J. concurred.

Rule discharged, without costs.

Drax v. *Scroupe*, T. T. June 2. 1831.

COURT OF EXCHEQUER.

PRACTICE. — WRIT.

It appears, that a notice at the foot of a writ of quo minus *to appear at the office of the Pleas of the Exchequer is sufficient, though not strictly according to the statute.*

Price moved to set aside a writ of *quo minus*, on the ground that the notice at the bottom of the writ stated that the object of it was, that the defendant might appear "at the office of the Pleas of the Exchequer," instead of at the Court itself.

Lord *Lyndhurst* C. B. and *Bayley* B. were both of opinion that this was a sufficient notice, as it went even further than the statute required; for it stated the very office of the court, at which, the defendant was to appear, and did not confine itself to the statement of the court, in which, he was to appear.

Vaughan B. and *Bolland* B. thought it better that the strict words of the statute should be pursued, and therefore they were of opinion that the notice was insufficient.

Rule refused. — *Anonymous*. T. T. June 9. 1831.

MINOR CORRESPONDENCE.

COMPENSATION TO COMMISSIONERS OF BANKRUPTS.

To the Editor of the Legal Observer.

SIR,

THE respect I entertain for you and your publication will not allow me to remain silent after the observations you have expressed respecting "Compensation to Commissioners of Bankrupts." I must confess, the feeling you evince towards them does credit to your heart; but I cannot with the same breath declare, that it has the like claim for your judgment. With your permission, I will briefly state my reasons for differing with your opinion, with this understanding, that I do so with perfect diffidence, but under a firm conviction that the position I take is as tenable as your own. True it is, "that it has been the immemorial usage, on the alteration of *any* office, to compensate its holders;" and pity 'tis, 'tis true, "even although the office *were a sinecure*." In the name of economy and retrenchment, is a sinecurist to be compensated—is he, who gives no *quid pro quo*—who has no property at stake—who does not (for he cannot) devote his time and his energy to the fulfilment of any given duty, (none being in existence)—to be supported in affluence and luxury by the thrift of others? In this situation, I maintain, is the sinecurist, or splendid pauper; and, by analogy, the commissioner. *His* duty, I contend, has not been *so* onerous, nor has he discharged it *so* zealously *as* to entitle him to the over-pay you have, in the plenitude of your generosity, petitioned for him, beyond the ample remuneration he already receives for the time he devotes to, and the talent he displays in the discharge of his duty as a commissioner of bankrupts. The office in question is a plaything in the hands of a talented man, and no other should hold it. He considers it in

a secondary point of view, pockets his fees, and thanks his stars that he is not "as other men are, extortioners."

The time has arrived, Sir, for the consideration of men and measures; to sift the chaff from the wheat; to lop, top, and trim the superfluous and dead branches from off both the political and legal tree, without regard to old customs and usages *because* of their antiquity; retaining the good; and blot out from the pages of both whatever is calculated to shackle the advancement of society, and its best interests. I hope you will receive this in the spirit I offer it; and remain, Sir,

Your Friend and Subscriber,
J. H.

DEMAND OF PLEA.

In answer to our correspondent J. N., we must observe, it is not to be presumed a plaintiff would apply to be allowed to serve a demand of plea in a particular manner, if the defendant were not entitled to it. Whether service at his last known place of abode would be sufficient or not, has nothing to do with the question; for it did not appear that the plaintiff ever was acquainted with his abode. After the defendant had been arrested, and a declaration delivered to him while in custody, the plaintiff could not treat him as a party who had not appeared. Since he must be treated as a party who had appeared, and as he was out of custody, the plaintiff could not sign judgment for want of a plea, without a demand of a plea being served. As it must be taken, that he was unacquainted with any of defendant's places of abode, it was quite consistent that he should wish to substitute the best approach to good service he could attain, for good service.

ANSWERS TO QUERIES.

DEBTS OF FEME COVERT.

1. THERE is a proverb that it might be invidious to repeat, on the facility of putting questions, and the difficulty of answering them. A little consideration in putting queries would often save much in resolving them. As to the queries here put—"Are the executors liable for the attorney's bill, or for any expenses of her last illness?" Here are two questions joined together that are wholly distinct,—questions dependent in no respect on any disputed point of law, but entirely of fact. The question merely is, Are the debts hers? Of the nature of the lawyer's bill, I think, we have just sufficient stated to *guess* that it *would* be considered her debt. Of the other, we have just sufficient stated to give us no information on the subject. Whether she were or not living with her husband,—the nature of the "expenses,"—her husband's circumstances,—at whose request incurred; all these matters, on which the whole point rests, are altogether omitted; and if stated, the question resolves itself into one of *fact*, and is hardly worthy to fill up these columns.

H. F. G.

2. To the attorney drawing the will, the husband clearly would not be liable, as such could not be deemed in law "a necessary;" and I should conclude the same in regard to the testamentary expenses; and, in truth, it is difficult to conceive how the husband could be charged with these expenses, when the wife ceased to exist: but the funeral is an act of necessity, the liability of which seems to fall on the husband, though there may be some doubt about it. In the case of *Gregory* v. *Lookyer*, 6 Madd. 90., the Vice-Chancellor (Sir *J. Leach*) doubted whether a husband had a right to throw his wife's funeral expenses upon her separate estate.

W. H. M.

INFANT-NECESSARIES.

If, from the facts, the jury could infer an authority to furnish the necessaries, either expressed or implied, on the part of the parent, the remedy will be against the parent. *Baker* v. *Keen*, 2 Stark. 501. If no such authority can be proved, U. D. O. should proceed against the infant, and his plea of infancy will not avail him. *Hands* v. *Slaney*, 8 T. R. 578.

G.

MISCELLANEA.

LAW AND ASTROLOGY.

I NEVER heard a truer satire against lawyers, than that of astrologers, when they pretend, by rules of art, to tell when a suit will end, and whether to the advantage of the plaintiff or defendant; thus making the matter depend entirely upon the influence of the stars, without the least regard to the merits of the cause.—*Swift's Thoughts on various Subjects.*

SALIQUE LAW.

Pharamond was the first king of the French, and a lawgiver amongst them. It is said that he was the maker of the law called the Salique Law; by which the crown of France may not descend unto their females, or (as their saying is) "fall from the lance to the distaff." Whence this law had its name is uncertain. Some say, from the words "*si aliqua*," so often used in it: others, because it was proposed by the priests called Salii; or that it was decreed in the fields which take their name from the River Sala. But one of their best writers affirms that it was never heard of in France till the time of Philip the Long, anno 1315. Others say, that it was made by Charles the Great after the conquest of Germany, where the incontinent lives of the women living about the River Sala (in the modern Misnia), gave both the occasion and the name.—*De terrâ verò Salicâ nulla portio hæreditatis mulieri veniat; sed ad virilem sexum tota terræ hæreditas perveniat*, are the words of the law.

This *terra Salica* the learned Selden, in his titles of honour, translates knight's fee, or land holden by knight's service, and proves his interpretation by a record of the parliament of Bordeaux, cited by Bodinas.—*Davila's* Civil Wars, l. 1. p. 6.

The Legal Observer.

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——— "Quod magis ad nos
Pertinet, et nescire malum est, agitamus."
HORAT.

TO THE LORD CHANCELLOR.

LETTER VI.

ON HIS MANNER OF PRESIDING IN THE HOUSE OF LORDS.

MY LORD,

IN the last letter which I had the honour of addressing to you, I took the liberty of adverting to your manner of disposing of your business in the Court of Chancery. I am happy to find that there now exists no ground for any further complaint or observation as to the discharge of that part of your Lordship's duties. It is to another part of them that I now wish to call your attention,—the discharge of your duties as Speaker of the House of Lords.

I shall, in the first place, shortly state the line of conduct pursued by your predecessors in office. It is the most important privilege of the Speaker of the House of Lords, to be able to address the House on all matters discussed in it. In this point the rights of his office differ from those of the Speaker of the other House, and of most other presidents of legislative bodies. It has always been considered, therefore, that the right should only be exercised on important questions. It is true, that the Speaker of the House of Lords, being always the Lord Chancellor, and one of the ministry, must take a lively interest in most of the measures which are agitated in parliament; but still it has been considered more correct and politic, that the president of the assembly should bear the semblance of impartiality; that he should not be eager to address it on every occasion; that he should not appear the daily partisan of the ministry; that he should not be foremost in the fight, and lead the van of every attack, or be the first to rush forward to defend the government. It has hitherto been considered to be the duty of the Lord Chancellor, on all ordinary occasions, to act as the president of the House of Lords; to come forward as a debater only on extraordinary occasions; and to exercise his privilege of address on one side of the question, only when it was absolutely essential to have the opinion of the highest authority on the subject.

"Nec deus intersit nisi dignus vindice nodus."

This has been the conduct pursued by former Lord Chancellors. It has, indeed, been occasionally departed from. Both Lord Thurlow and Lord Eldon, when they had filled the office for many years, were apt to speak oftener than the House, or their own friends, could have wished. This practice, however, was certainly not attended with any benefit. It was complained of at the time; it was only to be excused by their long continuance in office; and it had any effect but that of raising the exalted characters of those two eminent men.

Permit me now, my Lord, to turn to the line of conduct pursued by your Lordship since you have held the great seals. Accustomed to address the House of Commons every evening you were present at its sittings, you have been, in the House of Lords, unable to disentangle yourself from this habit. There have been many important questions discussed within the short time in which you have been Chancellor, in which, doubtless, it was most proper that your Lordship's opinion should be known; on all these you have delivered yourself at length: but you have not stopped here; on every debate, long or short, important or not, collateral or incidental, regular or irregular, on a petition or on a motion, your Lordship has exercised your privilege of address. You have borne the standard of your party into the thickest of the fight; you have raised your old war cry, and, throwing away your scabbard, you have smote down, with a two-edged sword,

the most redoubtable champions of the opposite party.

But your Lordship has not contented yourself with this. You have been long accustomed to the duties of an advocate. That is a life of constant conflict — it is a continued scene of contention. Personality and invective is there pushed every day to the extreme verge of the limits allowed to gentlemen. Your Lordship, after the long training you have had in this school, and coming immediately from it, must of course possess considerable advantages. Now, my Lord, you do not seem inclined to overlook them, or to permit your powers to grow stiff for want of exercise. You carry all your forensic habits with you to the woolsack. Your character of advocate is not merged in your character of judge; and you sometimes seem to consider yourself still in a *Nisi Prius* Court when you are presiding in the House of Lords.

Allow me, my Lord, to turn over the debates in the Upper House since you have been Lord Chancellor, and to call your attention to some few of these "passages of arms," which, I think, will bear out what I say.

The first of your Lordship's speeches to which I shall call your attention, was made on a debate on our commercial relations with Portugal. The whole speech is severe, and is chiefly directed against Lord Ellenborough; but there are particular passages which are worthy of peculiar attention as to the present point.

"If my noble friend," you say, meaning Lord Ellenborough, "had waited till a bill was brought in, he might perhaps have been able to complain of want of notice; but now, by leaping in the dark, and — to use a vulgar expression — before he came to the stile, the noble Lord has cut from beneath his feet what I deem his best argument against his Majesty's government."

Then, speaking of a particular argument, you go on to say, —

"By the way, who has told the House this? Why, the son of my noble friend, the late Chief Justice of the King's Bench. Now, if any lawyer, or any body wearing the garb of a lawyer, or even a layman, had, in the presence of my late venerable and learned friend, propounded so monstrous a proposition as that, to come at the true construction of an act of parliament, it was necessary to consult the individual who had brought it into parliament, I can figure to myself the utter indignation wherewith that learned and distinguished person would have heard that proposition. But *that he should hear a proposition so strange, so monstrous, advanced by his own seed, in his own House*, of which he was so distinguished an ornament, — in the great Court of appeal, the highest Court of the realm, in which the noble members sit as Judges, in which the advancer of the doctrine is himself a Judge, — *that would have been so monstrous a prospect*, that I should not have liked to be the individual, *the luckless wight*, to suggest to my late noble friend even *the bare possibility of a thing so monstrous*; for I well know how the statement would have been read".*

Thus, my Lord, do you dispose of my Lord Ellenborough.

I next proceed to your Lordship's famous speech against Lord Wynford, in defence of your bankrupt bill. Every word must have been as an arrow: —

"I say, then," you proceed to say, "that my noble friend's charge is compounded of oblivion and invention: *by invention I mean absolute perversion* — the most dangerous and most effectual of all instruments which can be brought into operation against any proposed scheme. This is the instrument seized by my noble and learned friend, who, under the garb of a friend, professing no hostility to the measure, and proposing only what may be considered as an amendment to it, knows that he is taking the surest, though the subtlest, course to defeat it. * * * The notion of my noble and learned friend is therefore a mere mistake, — a fiction, — a chimera of his own fertile and ingenious brain."†

These, my Lord, are only isolated portions. The effect of the whole speech was, I well remember, astonishing.

This, again, my Lord, is the sarcastic way you allude to another frequent speaker in the House of Lords, Lord Londonderry, in reply to one of his harangues: —

"My Lords, able and skilful orators, like the noble Marquess, frequently have a cunning way of rendering it difficult to get at their meaning, according to the known and ordinary acceptation of the terms which they employ, — they wrap up and mystify so successfully; but I, as your Lordships well know, am a plain man, and I say, without subtlety or refinement‡, &c."

Then, my Lord, perhaps you might have softened your exposition of the misconception of the learned and venerable Chief Justice of England. He is not often heard in the House, and his opinions are surely

* Mirror of Parliament for 1831, p. 362., and see p. 363.; see also Letter IV., vol. 1. p. 289.

† Mirror of Parliament, pp. 336. and 337. and see Monthly Record for March, p. 80.

‡ Mirror of Parliament, p. 1580.

worthy of deference from one who had long practised in his Court. But no; you thought it right to show him no mercy; for what can be stronger or more severe than your Lordship's reply to Lord Tenterden?

"My Lords," you say, "I am once more compelled to embark in this unfortunate discussion. I say compelled, after what has fallen from my noble friend, the Lord Chief Justice, upon the subject of parliamentary law; I feel myself under the necessity, for the sake of the dignity and character of parliament — for the sake of the country, and of the subjects of the king, as well as out of kindness to my noble friend. * * * My noble friend, the Lord Chief Justice, may be very right — and I know your Lordships think he is — in saying that you have the power [of fine and imprisonment]; but he cannot be right in the reasons which he has given for the possession of that power. Let him be quite right in saying that you have that power; but he must be quite wrong in the reasons which he has assigned for saying that you have it. What were those reasons? I heard them, my Lords, with wonder and amazement. He tells you, that because the Courts of law in Westminster Hall have the power to fine and imprison, so also must the Houses of Lords and Commons have that power. Good God! my Lords, whoever heard, till this instant — when were you ever told, till this day, *when you have been told by a Lord Chief Justice of England* — that the House of Commons has a right to inflict fines and imprisonment upon his Majesty's subjects in vindication of their privileges? No one who knows any thing about the law and the constitution of the country, can hesitate for a moment in saying that the Lord Chief Justice is in error here: and until I am told it by my noble friend, in terms the most clear and explicit, I will not believe that he is prepared to defend and justify in law what he has said; for he has thereby conferred on the House of Commons a power *which none of his least learned — none of the least calm — none of his least temperate — none of his most corrupt, or his least respectable predecessors ever dreamt of arming the Commons with*."*

These, my Lord, you will admit, are hard words. They may not be too expressive for a *Nisi Prius* Court, but they seem a little unsuited to the assembly in which they were addressed. They are, besides, merely selections from the many speeches which your Lordship has delivered in the same strain. I might have mentioned many others; as the speech upon Lord Stanhope, that on Lord Kenyon, &c. &c. But I refrain, as I think I have already cited enough for my purpose.

You appear, then, my Lord, to me, to have introduced an entirely novel style of address into the House of Lords; a style, I admit, constantly employed in a *Nisi Prius* Court, and possibly in the House of Commons, but never until now introduced into the House of Lords. You attack the noble peers composing that House as you would a brother advocate; you impeach their motives, ridicule their talents, and distort their meaning. Now, it may be said that some of them have first attacked you. Alas! it was an unequal fight: their weapons slid away without leaving an impression; but yours, my Lord,

> "Were given you temper'd, so that neither keen
> Nor solid might resist that edge."

Your antagonists may say, with Sir Andrew Aguecheek — "Had they thought thou wert so cunning at fence, beshrew them if they would ha' meddled with thee."

It may also be said that these noble Lords are just like other men, and must, therefore, be treated in the same manner; and this seems to be the current phrase of the day. However, as yet, an aristocracy is suffered to exist in the country; your Lordship has many times, and recently, declared that you will uphold that aristocracy; and if it is to exist at all, it is proper that they should possess all the privileges, and should enjoy the same treatment as heretofore. This they will not have. I have no hesitation in saying, if your Lordship continues to preside in the House of Lords in the manner in which you have lately presided, there will not be freedom of speech. However absurd it may seem, to say that one man can, by his simple presence, effectually prevent many others from addressing the House, yet the fact is so. It has become a matter of frequent complaint; and is not, I think, altogether groundless.

And now, my Lord, permit me to address one word to you as to the consequences of the existence of this feeling on yourself. Most earnestly do I hope that your Lordship will long hold your present office. If I have ventured to address you in plain, straightforward language, it is from no disrespect to your Lordship; but for the purpose of pointing out, in few words, the precise situation in which you appear to

* Mirror of Parliament, p. 1700.

stand. I look to you for effecting a great and practical reform in the laws, and my hopes would be dashed down if your Lordship were to retire from your present office.

But, my Lord, it appears to me, that you cannot long hold the great seal, be your capacity for it what it may, if you pursue your present course. Already there is a strong feeling against you in the House of Lords. A speech of five minutes' length, nay, one bitter or sarcastic epithet, may raise up to your Lordship a powerful enemy for the whole of your life. It will, besides, become a common cause with the peers. If a determination appears on your part to attack them, they will band together in their own defence. They will not long endure a treatment which tends to bring them and their order into contempt; and, if once completely united against you, you will be borne down by numbers.

My advice may be considered presumptuous, but I can assure your Lordship that it is entirely sincere, when I say that, if your Lordship has any desire to retain office, — a desire which, at least, is felt almost universally by others, — there must be a change in your manner of presiding in the House of Lords. Your Lordship will have to moderate your feelings to the tone of the assembly you are addressing, to soften your language, to lay aside your sarcasm and invective, or the tenure of your present office will not long be firm, though every lover of his country is desirous that it should be measured only by your life.

I have the honour to be,
My Lord,
Your Lordship's most obedient servant,
A BARRISTER.

Lincoln's Inn,
July 4.

CHURCH REFORM.

ANALYSIS OF THE ARCHBISHOP OF CANTERBURY'S BILL FOR ENCOURAGING AND FACILITATING COMPOSITIONS FOR TITHES.

WE have obtained copies of four important bills relative to the alteration of the ecclesiastical polity of the kingdom. They are, 1. A bill intituled, "An Act for encouraging and facilitating Composition for Tithes, and other Payments arising and payable to Incumbents of Ecclesiastical Benefices in England and Wales." 2. A bill intituled, "An Act to extend the Provisions of an Act passed in the Twenty-ninth Year of the Reign of his Majesty King Charles the Second, intituled, 'An Act for confirming and perpetuating Augmentations made by ecclesiastical Persons to small Vicarages and Curacies, and for other Purposes.'" 3. A Bill, intituled, "An Act to restrain and regulate the holding of Plurality of Dignities and Benefices by Spiritual Persons;" and, 4. A Bill intituled, "An Act for the Commutation of Tithes in England and Wales." The three first are introduced by the Archbishop of Canterbury, the last by Lord Dacre.

In our next Number we shall enter fully into the consideration of this important subject. We now present an analysis of the first bill, and shall, if possible, insert abstracts of the other three bills in our next Number.

It recites, that it is expedient that compositions in respect of tithes, and other payments yearly arising or becoming payable to rectors, vicars, and other incumbents of ecclesiastical benefices or livings in England or Wales, should be encouraged and facilitated, and therefore it is proposed to be enacted as follows: —

That power be given to the incumbent and the owners of *two thirds in value* of the lands subject to tithes to make a binding agreement for a composition in lieu of all the tithes, to endure for such time as after mentioned.

A commissioner or commissioners to be appointed by the agreement for carrying it into effect.

Two parts of the agreement to be executed.

The archbishop or bishop of the diocese and the patron to consent.

The form of the agreement is contained in the first schedule.

But those lands only are to be taken into account which are subject to tithes usually paid.

The value of the lands to be estimated by the poor rate.

All the signatures to the agreement to be affixed within six months after the date of the agreement.

One part of the agreement to be deposited in the registry of the diocese, the other part with the churchwardens of the parish.

Notice to be given of the agreement affixed on the church door.

Power to the Court of Exchequer, on application, to set aside any agreement, unless satisfied that a due proportion of owners have signed, &c.

Thirty days' notice of an intention to apply to the Court to be given to the commissioners.

Power to the Court to direct the trial of any issue.

No application or action to be stayed, or to abate by death, &c.

Costs to be in the discretion of the Court.

Every agreement, *unless vacated* under the preceding clauses, to be valid, *although not signed* by a due proportion of owners, &c.; provided it has been signed by the incumbent, and by the archbishop or bishop, and by the patron, and a notice has been given.

No proceedings to be taken by the commissioners pending an application.

Power to appoint new commissioners in the event of death, &c.

Power to justices to decide whether a commissioner has neglected to act, &c.

The form of the affidavit to be made by a commissioner is given, and it is to be deposited in the registry of the diocese.

Power to commissioners to require written statements from the incumbent, and from owners and occupiers, respecting the tithes payable.

Power to the commissioners to make admeasurements, maps, and valuations; or to use former admeasurements, maps, and valuations.

The power of making admeasurements and maps may be restrained by the agreement.

Power to the commissioners to employ a clerk, surveyors, &c.; and to take the opinion of counsel.

Power to the commissioners to enter lands without being subject to any action.

The parties may either fix the amount of the composition money, or leave it to be fixed by the commissioners.

The amount of the composition-money, if not fixed by the agreement, is to be fixed by the commissioners.

The composition-money to be applotted by rateable assessments on the lands subject to tithes, and to such amount only as have been usually received.

Separate assessments to be made on lands in different occupations; and in the case of lands in the occupation of the same person, separate assessments to be made in respect of different parts of the lands, or different kinds of the tithes, if the owner or occupier requires it, or if the commissioners think it expedient, or if any doubt is made as to the liability of any land to tithes.

The commissioners to make an award, stating the whole amount of the composition money, the annual sums assessed by the commissioners, the lands on which and the tithes in respect of which the assessments are made, the average price of English wheat for the seven preceding years, the day from which the composition is to commence, and two half-yearly days on which the sums assessed are to be payable.

A draft of the award to be deposited at some convenient place in the parish for inspection, before the same is executed.

Not less than seven days' notice to be affixed on the church door, and a time and place for hearing and receiving objections to be appointed.

The draft to be amended, if necessary; and if altered, to be again deposited, and the same proceedings repeated.

Two parts of the award to be executed, and notice of the same to be affixed on the church door, and inserted in a newspaper or the Gazette.

One part of the award to be deposited in the registry of the diocese, and the other with the churchwardens of the parish; and all persons interested may have copies or extracts.

The commissioners to obtain from a barrister of five years' standing, appointed for the purpose, a certificate that the requisitions of the act have been complied with.

Such certificate to cure all informalities, provided the award is duly executed, and the agreement has not been vacated by the Court of Exchequer.

The annual sums assessed by the commissioners to become charged on the land *for twenty-one years*, or any less term which shall be agreed on; and to be payable by the occupiers *half-yearly*.

The commissioners not to have power to decide on the title to tithes; and if the lands on which any annual sum is assessed in respect of any tithes shall be discharged of such tithes, such annual sum shall not become charged.

If part of the lands be exempt from tithes, a part only of the sum assessed shall become charged on the remainder of the lands; but the whole sum shall remain charged on all the lands till the same shall be apportioned.

If the lands, or any part thereof, being subject to some tithes, shall be exempt from others, a part only of the sum assessed shall become charged; but the whole sum shall remain charged till the same shall be apportioned.

Power to any owner or occupier to have any annual sum of money apportioned for the purposes of the preceding clauses. Two apportioners to be chosen, who are to make the apportionment, with power to choose a referee in case of a difference of opinion.

If no apportionment be made within two months, new apportioners may be chosen.

Instruments of appointment of such apportioners to be deposited in the registry of the diocese.

Costs of apportionment to be paid by the person requiring the same.

During the composition the right to tithes to be suspended.

The right to any tithes in respect of which no assessment shall be made, is not to be affected.

A renewed composition may be made during the continuance of a prior composition, of which there is not more than three years to come.

In such case, no interval shall take place between the two compositions.

On a new composition, the assessments may be regulated by the assessments under any prior composition, if so desired.

Existing leases of tithes, and existing compositions, are not to be prejudiced.

Remedies for enforcing the payment of the composition money by suit in equity, action of debt, or *assumpsit* at law, or for certain sums, by summary proceedings before magistrates.

The forms of pleading are prescribed in the bill.

Goods and chattels on any lands assessed under this act not to be distrained for rent or taken in execution without satisfying the incumbent one year's arrears of the money charged on such lands. Money so paid may be levied by the party paying the same.

Limitation of actions and suits for the recovery of composition money to be the same as now in force.

Power to apportion any assessment with reference to different parts of the land.

Occupiers may, in certain cases, deduct from their rents sums paid to the incumbent, if the owner signs the agreement without their consent.

All accounts to be allowed by an auditor appointed by the agreement, who is to certify the total amount of expenses.

Provision for the appointment of a new auditor in case of death, &c.

The proportion of the expenses to be borne by the incumbent is to be fixed by the agreement or by the commissioners; the remainder is to be borne by the owners of the lands charged with the composition-money.

Provision for distributing between successive incumbents the proportion to be borne by the incumbent.

Powers to the commissioners to enforce payment of costs.

The remuneration to commissioners may be fixed by the agreement; if not so fixed, then the auditor to fix it; and the auditor to be paid according to the agreement, or to charge a reasonable remuneration.

Townships may be considered as separate parishes.

Where there is no church in the parish, the notices to be fixed on the church where the owners or occupiers usually resort.

Punishment of perjury.

Power to any incumbent to make a binding composition for any particular tithes.

The agreement for such composition to be signed; and to be made with the consent of the archbishop or bishop, and of the patron; and to express the term, which is *not to exceed* 21 *years*; and to express the average price of wheat at the time; and to be deposited in the registry of the diocese. The composition-money not to be less than *l.* No fine to be taken by the incumbent.

Such agreement to comprise all the lands in the occupation of the party compounding, and to contain a power for the incumbent to determine the agreement, in case such person afterward becomes the occupier of other lands.

Agreements by owners having a partial interest to be binding on future owners.

No agreement to be binding on lessees, without their consent.

Provisions relating to general compositions to apply in part to the case of particular compositions.

Power to have the amount of composition-money adjusted according to alterations in the price of wheat, by an order of justices.

The amount of the money payable to the incumbent to vary according to the order made by the justices.

The composition-money is to be invariable when the term does not exceed 14 years.

The person entitled to the first presentation to be considered the patron for the purposes of the act.

Where the living is above 20*l.*, and the patronage is in the crown, the First Lord of the Treasury to be the patron. If not above 20*l.* the Lord Chancellor to be the patron.

The persons entitled to the first estate of freehold, or for years, to be considered owners of lands, except lessees at improved rent. So mortgagors and *cestnique* trusts, except mortgagees or trustees in possession, and then the latter to be considered owners.

Minors, &c. are to be bound by the acts of their guardians, &c.

When the living is sequestered, the incumbent is not to act without the consent of the sequestrator.

Persons holding different characters may act separately in each.

Provision as to peculiars.

Copies of instruments deposited in the registry to be evidence.

Fees to the registrar: for depositing, 5*s.*; for inspection, 1*s.*; and 6*d.* per folio for copying.

Sealing by bodies politic equivalent to signing.

AMENDMENT OF THE STATUTE OF FRAUDS.

ANALYSIS OF SIR EDWARD SUGDEN'S BILL.

THE objects of this bill, according to the statement in the preamble, are as follow:—

By the act of 29 Charles II. "for the prevention of Frauds and Perjuries," no action could be brought to charge any person upon any contract or sale of lands, &c. or any interest therein, unless the agreement, or some memorandum or note thereof, should be *in writing and signed* by the party, or some authorised person. *

But it has been held (in construing this act), that an agreement signed by one party only, or his agent, is binding upon him; and that it is not necessary for a party, or his agent, to subscribe his name to the agreement for the purpose of authenticating it, where the name is introduced into the agreement itself.

In some cases, contracts have been allowed to be collected from receipts, letters, or proposals, &c. Courts of Equity have also held, on the ground of part performance, certain cases of *parol* agreements not to fall within the mischief of the enactments; and that a pledge or deposit of title deeds to secure money, gives an equitable lien on the lands, &c. though unaccompanied with any transfer or mortgage, or any memorandum or note in writing.

It being deemed expedient to alter and amend the law thus administered, the following enactments are proposed:—

That no action or suit shall be brought or maintained, whereby to charge any person upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which the same is brought, or some memorandum or note thereof, shall be *in writing and signed by the parties* to be charged therewith, or some other persons by them lawfully authorized, *at the foot*

* There is a similar enactment in 7 W. 3.

thereof, in the *usual manner of subscribing regular agreements.*

That letters or correspondence passing between parties or their authorized agents, or an offer in writing by the one party and acceptance in writing by the other, shall not be deemed in any case to amount to an agreement upon which an action or suit may be brought or maintained under the provisions of the said recited acts or of this act.

That neither delivery of possession of the estate which is the subject of the contract, nor payment of the purchase money or rent agreed to be paid for the estate, or expenditure of money by any of the parties on the estate, or any other act whatsoever, shall be deemed to amount to a part performance of any agreement made upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, so as to enable a Court of Equity to decree a specific performance of any such agreement, where the same is not signed in the manner required by this act.

That where any agreement shall be *bonâ fide* made upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning the same, and the same shall not be signed in the manner by this act required to enable an action or suit to be brought or maintained thereupon, but where it is upon a sale, and the seller, upon the faith and footing of such contract, shall have let the purchaser into possession of the property sold, or the purchaser, upon the faith and footing of such contract, shall have paid to the seller the purchase-money or any part thereof, or having been let in possession of the property, shall, with the acquiescence of the seller, have made any substantial repairs or lasting improvements upon such property, and where in any such case either of the parties to such contract shall refuse to perform the same on his part, the other of the said parties shall or may maintain an action against the party so refusing, for the recovery of the damage sustained by him by the payment of any such purchase-money, or by the expenditure in such repairs or improvements, or by the loss of the rents and profits, or possession of the property sold, as the case may be; and in every such action brought by a seller, the defendant, the purchaser, shall be at liberty to set off, against the plaintiff's demand the amount of any purchase-money paid to the plaintiff by the defendant, with interest thereon at the rate of 4*l.* per cent. per annum, and the amount of any monies actually expended by the defendant in substantial repairs or lasting improvements on the estate of the plaintiff, with his acquiescence; and in every such action brought by a purchaser, the defendant, the seller, shall be at liberty to set off against the plaintiff's demand the amount of any rents and profits of the property sold, which shall have been received by the purchaser, or an occupation rent for the property sold, where it shall have been in the plaintiff's own possession, as shall be just; and where any such agreement as last aforesaid is upon a letting, and the intended tenant, having been let into possession by the intended landlord (the other contracting party) shall, upon the faith and footing of such contract, with the acquiescence of the landlord, have made any substantial repairs or lasting improvements on such property, and the landlord shall afterwards refuse to perform the agreement, in any such case the tenant may maintain an action against the party so refusing, for recovery of the damages sustained by the expenditure in such repairs or improvements; and in such action the defendant shall be allowed such set-off as shall be just; and the amount of the damages recovered in any such action by a purchaser or tenant shall be and be deemed an equitable lien on the estate contracted to be sold or let, as and from the day on which such contract was entered into, and shall carry interest from the time the verdict is given; and in every such case as aforesaid, where a lien is to be established on the estate contracted to be sold or let, or where an account is to be taken between the parties, either party may file a bill in equity against the other, for the purpose of enforcing the rights hereby given.

That no deposit or pledge of any title deeds shall be deemed to give or confer any equitable lien on the lands, tenements, or hereditaments to which they relate, or any interest in or concerning the same lands, tenements, or hereditaments, for any past, present, or future advances, unless the agreement in respect of which such lien is claimed, or some memorandum or note thereof shall be in writing, and signed in the manner hereinbefore required by the party making the pledge, or some other person by him authorized.

The bill then recites, That by the said acts it is further enacted, that all devises of lands deviseable, either by the Statute of Wills, or by custom, shall be in writing, signed by the party devising, or by some other in his presence and by his express directions, and shall be attested and subscribed in the presence of the devisor by three or four credible witnesses, or else they shall be void: And that it is expedient to alter and amend the law as it is administered under the said statutes in the respect last aforesaid; It is therefore proposed to be enacted, that where any such devise as aforesaid in writing shall, without fraud, be attested and subscribed by three or four credible witnesses as part of the transaction which they are called upon to witness, and before they depart from the house or place wherein or whereat the will was signed by the testator, the same shall be deemed an effectual attestation within the said statutes, although not subscribed in the actual presence of the devisor, or where he might see the witnesses subscribe the same.

That the act shall operate on all such agreements and deposits as aforesaid which shall be made after the *passing of the act*, and upon all such devises as aforesaid, where the devisors making the same shall die after the *passing of the act.*

REVIEW.

The Trial at Bar, Rowe *v.* Brenton, *in the Court of King's Bench, as to the Right to Minerals in the Assessional Lands of the Duchy of Cornwall, with the Records and*

Documents as given in evidence. By George Concanon. Published by John Richards, 194. Fleet Street.

THIS is the Report of a Trial at Bar of considerable importance. We introduce it to the notice of our readers on two grounds: first, on account of several material points in the law of evidence, which were decided in the course of the cause; and, secondly, in regard to the numerous documents of the greatest antiquity which were adduced in evidence.

The action which forms the subject of the Report (as appears by the introductory statement), was brought to try the right to copper ore raised from the East Crinnis mines, which are situated in a conventionary tenement in the manor of Tewington, in the county of Cornwall. Tewington is mentioned by the name of Bewingtone, under the head of *Terra Regis*, in Domesday, and is one of the seventeen assessional manors which were comprised in the grant to Edward the Black Prince on the creation of the Duchy, in the 11th year of the reign of Edward III.

The defendant sought to establish his right to the minerals as deriving title under the Duchy of Cornwall; the king, as lord of the soil of the property in question in respect of his duchy, having reserved his right to the minerals on the sale of the manor; and the defence was founded on these propositions; — First, that both the tenure and interest of the conventionary tenants of the assessional manors of the Duchy of Cornwall were base, and that the right to the soil was in the lord; Secondly, that therefore the conventionary tenant could have no other right to the minerals than what might be given him by custom.

Our limits rendering it necessary that we should be as brief as possible, we notice the following as the principal points which were determined by the Court on the several objections taken to the evidence.

The plaintiff having opened his case in trover for minerals raised from under his land, by proving possession of the surface only, without having shown property in the mines, it was contended for the defence, that the plaintiff should be nonsuited; but the Court decided that the question should go to the jury.

Evidence having been given of a search in the proper repository without success, secondary evidence of an inquisition *post mortem* was admitted from a recital of the same in certain proceedings, entered on a *Coram Rege* Roll.

Where the defendant sought to give in evidence the tenure and customs of a certain district of manors, respecting a question arising in one of those manors, it was decided that evidence may be read to show that there exists, in several manors, a certain class of persons; but it does not follow, from the admission of proof of the latter fact, that the party tendering it will be at liberty to draw any inference, either by evidence or argument: the fact may be proved; but the consequence of such proof must be matter of subsequent argument.

Where an objection was taken to the evidence of a caption of seisin of the possessions of the Duke of Cornwall, 2 Edward III., upon the ground that it was a private document, it was overruled: the interest of the Crown being concerned.

The admissibility was contested, of an extent of 1 Edward III., which did not purport on the face of it to be taken under any warrant from the king, or specific commission, or a competent authority; but there being officers whose duty it was to take it, and it being found in the proper depository, it was presumed to be taken under competent authority, and was admitted in evidence.

The evidence of certain answers by the tenants of several manors, part of a district of manors, to questions put to them by the lord respecting their tenure, &c. were objected to on the ground that the interrogatories were not produced; but the answers were admitted to be read, after proof of search for the interrogatories: and though any obscurity would take away their effect, the Court would not refuse to let them be read.

It was objected, that the enrolment from the Duchy office of a lease granted by the Duke of Cornwall could not be received in evidence until proof had been given of the loss of the original lease (or at least of a counterpart); but there being an officer, called the auditor, who was one of the officers appointed to manage the duchy property, whether in the hands of the king or the duke; and on the ground of the interest of the Crown, and the identity of the interest in the duchy between the duke and the king, the same was received in evidence.

Evidence of the enjoyment of the rights to minerals, in a district of manors, being tendered in a question as to the same right in one of those manors, the Court were of opinion it should be received. It was in evidence, that from very ancient times a particular class of tenants had existed in a certain district of manors; and it was decided, that in order to learn the incidents belonging to that district, evidence must be received of the rights of the lord and the rights of the tenants in other parts of the same district; the tenements in each part of the district being holden in the same manner, and from the same lord: it was not a question, whether the custom of one manor was to be given in evidence to show the custom of others; the custom of descent or the rights of widows, &c. could not be proved in respect of one manor, by usage in other manors; but the assession rolls being silent on the subject of mineral rights, and other documents relating to the tenure of the whole district not being sufficiently specific on the subject in question, and the grants of one manor using similar language to the grants in the other manors of the same district, made by the same servants of the Crown, or the same servants of the duke, if usage, for a series of years, had put a

construction upon the language in one place, it would throw light upon that which was to be the true construction of the same language in another place, it ought to be admitted.

The receipt of moneys by a deceased collector, proved by his own entries in his account book, charging himself with such receipts, his son first proving that his father was such collector, and that the book produced was kept by his father in that capacity.

The following is a list of some of the ancient and curious records and documents which were brought forward, and which will be found fully set forth in the work; and the several offices in which the originals are deposited are, we believe, accurately stated:—

Domesday Book.
Commission of Inquest, 2 Edward I.
Extracts from the Returns to the Commission.
Inquisition *post mortem* Edmundi Com. Cornub., 29 Edward I.
The following Charters:—
15 Henry III.
1 Edward II. for Piers de Gaveston.
11 Edward II. for Isabella Queen of England.
5 Edward III. for John of Eltham, Earl of Cornwall.
11 Edward III. creating the Duchy.
33 Edward I. } Charters of Liberties to Tin-
3 John. } ners of Cornwall, &c.
3 Henry IV. }
23 Henry VII. Grant of Pardon.
Ministers' Accounts, Edward I. III. IV. Henry VI. VII. and Elizabeth.
Caption of Seisin.
Extent of Tewington.
Parliamentary Survey.
Assessional Rolls, from 7 Edward III. to 54 George III.
Court Rolls of Tewington, Henry VIII. James I. Charles I. and Charles II.

In closing this notice, it is due to the editor of the work to state, that it bears evidence of being carefully and diligently prepared; and we may safely say, that it contains much interesting and useful matter on the branch of cases to which the trial relates. We think that the publication of such works ought to be encouraged by the profession, and we hope the author will not go without his reward. He is at all events entitled to the thanks of his brethren.

DISPUTED DECISIONS.

No. IV.

RE-ADMISSION OF ATTORNEYS.

In the 31st No. page 61. *antè*, a decision of Mr. Justice *Taunton* is reported, respecting the re-admission of an attorney, who had for two years ceased to take out a certificate. With all deference to the learned Judge, I conceive his decision to be wrong. I am aware there are many cases in which the Court has adopted the same course that he did, by re-admitting the attorney on payment of arrears of duty and a fine; but, in all those cases, the Court seems to have taken the law for granted, without much consideration, nor did the construction of the statute (37 G. 3. c. 90. § 31.) become the subject of argument at the bar. If it had, I have too much respect for the Judges to suppose that they could have decided in conformity with the prevailing practice, which is both unjust and absurd. The certificate duty is a tax on *practising* solicitors, and was never intended to be paid by such as had ceased to practice. Why, then, in such a case as that before Mr. J. *Taunton*, should the attorney pay the *arrears* of duty for a period when, not having practised, he was not bound to pay duty? As well might a person who re-opens a window be called on to pay tax for the time it was closed. The imposition of a fine is more unreasonable still. That such a demand is unjust, it requires, surely, no argument to prove. The absurdity of insisting on re-admission is equally obvious, and is unwarranted by the language of the act. If *mere omission* for a year to take out a certificate avoided the previous admission, it would follow that re-admission was necessary; but the words of the act are not as your report states Mr. J. *Taunton* to have quoted them; "if an attorney *ceases* to take out his certificate," but if he *neglects;* and in the cases of *Ex parte Matson*, 2 D. & R. 238. and *Ex parte Cunningham*, 1 Bingham, 94. it was held, that *neglect* imported a *culpable omission*, which could not take place while an attorney was out of practice; a very sound and rational construction of the statute. Now, the necessity of re-admission, and the liability to arrears of duty and fine, stand on the same footing. They depend on the obligation to take out a certificate during the cessation of practice. If there is such an obligation, then the neglect of it renders it indispensable that the attorney should be re-admitted, and warrants the imposition of a fine and the demand of arrears of duty. But if, as I submit, there is no such obligation, then the attorney is free from those liabilities which, according to the prevailing opinion, he incurs by not obtaining *a licence to practise* during the time of his *being out of practice!* The provision of the act is penal, and is intended to protect the revenue, in which point of view it is very

reasonable. Practising attorneys are required to take out certificates stamped with a certain duty; if, in fraud of the revenue, they neglect this *at all*, they incur a penalty — but if they persist in their neglect *for twelve months*, then the act says that, in addition to the penalty, they shall be subject to the further punishment of disqualification. The legislature certainly never contemplated the case of attorneys *ceasing practice* for a time; and almost the whole of the decisions have proceeded upon the erroneous notion that "neglect" was synonymous with "omit;" an error which does not seem to have occurred to any of the Judges before the above cited cases were under consideration. Of course, the foregoing remarks apply, *à fortiori*, to the case of an attorney who, after his admission, suffers a year to elapse before he *begins* practice. It appears to have been held by the Courts, that though an attorney has never begun to practise, his admission becomes void by ceasing for a year to take out a certificate. I understand, however, at the Master's office, that in such a case it is not necessary to apply for re-admission; but I have not been able to ascertain whether there is any authority for this position, beyond the opinion of the Master, which, though I much respect it, and most decidedly think it right, seems in direct opposition to this opinion. This latter point is of great and general importance, as it is a very common thing for gentlemen to let a year elapse after admission before they commence practice; and they naturally think that, till then, a certificate is not necessary. Supposing them wrong in this notion, they are all unqualified persons, liable to penalties, and incapable of suing for their bills. What the law really is, it is very desirable the profession should be apprized, with as much certainty as the case admits; and I hope that yourself, or some of your able correspondents, will at an early opportunity take up the subject.

R. J. E.

SITTINGS IN THE EXCHEQUER COURT OF EQUITY.

Under the late act of parliament for the improvement of the administration of justice in England and Wales, an additional Judge was appointed to three of the Courts at Westminster, with a view of giving greater despatch to business, and thereby lessening the burden of law expenses. In the Exchequer Court of Equity it has failed of late to produce that effect.

The late Lord Chief Baron, Sir William Alexander, complying with the intention of the legislature under that act, gave his sole attention to the Court of Equity, leaving the other four Barons (who are fully competent) to preside in the Common Law Court; thereby establishing two distinct Courts, and affording the relief intended by the act of parliament.

The present Lord Chief Baron, unfortunately, to the great prejudice and injury of the suitors in equity, and to the profession in general, has adopted a course totally different; for during term he sits but two whole days, sometimes only one in the week in the Equity Court; the other days he sits at Common Law, obliging one of the puisne Barons to vacate his seat until the learned Chief removes into the other Court, which is usually about three or four o'clock: the consequence is, that the equity bar and solicitors spend the whole morning in momentary expectation of the Judge's appearance, which, being at so late an hour, little if any business can be transacted; it therefore stands over from day to day, week to week, and often from term to term, at an enormous expense to the suitors, who have to pay the daily expenses of their professional agents, and refreshing fees. At a time when law reform is so justly called for by the public, and promised by the government, surely such a practice as this ought not to continue.

Independent of the above grievance, the country is deprived, in a great measure, of the real benefit of one of its Courts of Equity.

As this is a matter which rests entirely with the Lord Chief Baron, I confidently hope, when it is fairly considered, that in the ensuing Michaelmas term his Lordship will see good reason to adopt the practice of his late predecessor.

R. B. A.

OBJECTIONS TO THE NEW RULES FOR THE IMPROVEMENT OF THE COMMON LAW PRACTICE.

We have stated our *qualified* approbation of the New Rules, on the supposition that other regulations and correspondent measures will be adopted, without which, we repeat, the present rules will fail of their effect: if the object be, as we suppose, the establishment of a more unexceptionable system for the administration of justice. Having thus presented our own views, we think it due to the members of the profession to admit freely their remarks on the nature and operation of the changes which have taken place; and for the present we select the following communications.

Surely, Mr. Editor, when you are extolling the New Rules, as the appropriate and consistent commencement of the commissioners' improvements, some doubt must occur as to the praise attaching to these regulations, which will operate to make law still more dilatory and

vexatious than before; I mean those which will shorten the practical duration of term, to a suitor living at a distance, by nearly *one half*.

He cannot declare so as to get a plea unless he serve his writ six days before the end of term; and of course he must, at least three or four days before, have made up his mind to proceed, and have written to town for the writ. I understood that the restraints imposed by the terms were acknowledged evils, and that the commissioners contemplated removing them: but surely they did not intend to make the matter still worse. If it be right (as perhaps it is) to give a defendant a few days after service of the writ, it is no more than justice to require him to receive the declaration for *six days after term*, where the writ is not served early enough for the plaintiff to proceed earlier.

At present a plaintiff in the Exchequer can bring a cause to trial in the vacation, though the cause of action occurred, and the action were brought, as late as the last day of term. Under the new rules, six days of this liberty are abridged, and suitors must in Trinity term find themselves without any remedy for nearly six months, if they are not exceedingly on the alert, or if the cause of action arise when the term is about half advanced. B. W.

One of the New Rules of Court declares, "that no declaration *de bene esse* shall be delivered until the expiration of six days from service of process or arrest, &c. Now, a late act authorises that *mesne* process may be made returnable three days before the commencement of term; and since the new rule does not "take effect" until "the first day of next Michaelmas term," I think it might be no violation of its true construction, to declare *de bene esse* after the lengthy manner about to be abolished upon all writs returnable on the 31st day of October next, served more than six days before the return.* J. G.

The sages of Westminster Hall, in the formation of these rules, prohibit the *delivery* of a declaration *de bene esse*, until the expiration of six days from the service of process, or from the time of arrest, in bailable actions. This leaves the old practice of *filing* declarations *de bene esse* on the return day of the writ untouched, which could not have been the intention; it seldom happening that declarations are *delivered* until defendants are in court, in which cases a longer period intervenes between the service and arrest, and the *delivery* of the declaration, than that prescribed by the New Rules. C.

NOTES OF THE WEEK.

COMMENCEMENT OF THE OPERATION OF THE NEW COMMON LAW RULES.

It was stated at the recent meeting of the Law Institution, by one of the members, "that the new regulations of the Judges respecting common law proceedings came into operation instantly; and that any declarations drawn up according to the old forms would be set aside for irregularity." This statement has been inserted in most of the newspapers; but requires some explanation.

There are two sets of rules: the first applying to the *forms* of declarations; and the second to bail, particulars of demand, imparlance, non-pros, summonses, the time of *delivering* declarations, ejectments, taxing costs, and motions to plead several matters, &c. Each set of rules is distinctly signed by the Judges; and the last clause in the second set, which directs that "*these* rules shall take effect on the first day of next Michaelmas term," seems, therefore, to apply to that set only. The first set expressly orders, that "if any declaration in *assumpsit, hereafter* filed or delivered, [that is, after the last day of term, when the rules were pronounced] *and to which the plaintiff shall not be entitled to a plea as of the term*, being for any of the demands mentioned in the schedule of forms, &c., shall exceed," &c.

The rules, however, not being promulgated until the last day of term, could not, of course, affect declarations filed or delivered on that day; and in the second set of rules, where there is a limitation to declaring for six days, the change is expressly appointed to commence only the next term.

PROCEEDINGS IN PARLIAMENT RELATING TO THE LAW.

Tuesday, July 5.

Lord *Viscount Althorp*.—Bill to amend an act for appropriation of fees in the Courts of law.

Tuesday, July 19.

Mr. *O'Connell*.—Bill to consolidate and amend the laws relative to juror and juries in Ireland.

Tuesday, July 26.

Mr. *O'Connell*.—Bill to enable defendants in prosecutions for libel, to give in evidence the truth of the allegations in the alleged libel, in order to negative criminal intent.

Thursday, July 28.

Mr. *O'Connell*.—Bill to amend act 6 Geo 4. c. 51. special juries and indictments (Ireland).

THE REFORM BILL.

The following is the clause in the new Reform Bill, which has crept in so unaccountably:—

"Provided always, that no tenant so occupying such premises as aforesaid, at a yearly rent of not less than 10*l*., shall by reason thereof acquire a vote in the election for any city or bo-

* See Notes of the Week, *post*, where this point seems to be disposed of.—Ed.

rough, if such rent shall be payable *more frequently than once in every half year*, or if by any agreement or contrivance, or by virtue of any local act of parliament or otherwise, the landlord shall be liable to the payment of the rates for the relief of the poor in respect of such premises: provided, nevertheless, that where by virtue of any local act of parliament the landlord shall be liable to the payment of such rates, it shall be lawful for any such tenant *to claim to pay such rates*, and upon his actually paying the same to acquire the right of voting, as if his landlord had not been so liable for such rates."

LAW INSTITUTION.

The fifth and last call on the Members of this Institution of 5*l.* per share has just been made; and the Committee have fixed the payment for the 1st of August.

LEGAL SINECURES.

We again repeat, for the hundredth time, that all plans and schemes for law reform will be useless and ineffectual, unless they reach the great sinecurists who now prey on the vitals of the administration of justice. We have willingly opened our pages to the consideration of this subject.* We intend, in our future Numbers, to take a closer view of it; and, to enable us to do this more effectually, we earnestly beg our readers and correspondents to send us all the information on this matter in their power, which, in addition to what we ourselves possess, will furnish us with materials for a series of papers, which, we hope, will have some effect in sweeping the whole band from the places they now encumber.

SUPERIOR COURTS.

LORD CHANCELLOR'S COURT.

LUNATIC.—PETITION.—9 Geo. 4. c. 40.

The Lord Chancellor cannot exercise the authority given to him by the 9 Geo. 4. c. 40. §§ 39. & 42. on petition.

This was a petition under the 9 Geo. 4. c. 40. §§ 39. & 42., praying that the Lord Chancellor would order a person properly qualified to visit the petitioner, and report whether or not he was in a sound state of mind. The petition stated, that the petitioner had been removed from his own house to a lunatic asylum, and prayed either that a commission might issue, or that an enquiry might previously be made into the state of the petitioner's mind. The petition was supported by affidavits; one by a practitioner who had attended the petitioner for the last thirty years, of the sanity of the petitioner.

The *Lord Chancellor* said, that the act of parliament on which the application was made empowered the Lord Chancellor, the Chief Justices of the King's Bench and Common Pleas, and the Secretary of State, to direct enquiries into such a case as this was represented to be. The application might be made to them by private letter, in conversation, or upon affidavit, if they should think fit to require; but there was nothing in this act enabling him or any other Judge, as a Judge sitting in open court, to hear such a matter as this on petition. The circumstance of the Secretary of State being clothed with the same powers as the other persons he had named, was enough to show that the act had no judicial import; but that the authority it conferred upon him was merely ministerial. The Secretary of State had merely a ministerial authority; none of his acts were magisterial. He was ready to act in this case, but not on petition. And, as the petition had been presented by a solicitor, who had endeavoured, but had not been able, to gain access to the alleged lunatic, who appeared as the petitioner, the petition must be dismissed, with costs to be paid by the solicitor, as being the party who put this application in motion. In the course of the argument the *Lord Chancellor* stated that he could not hear an anonymous case; but the names of the parties must be stated.

Mr. *Wyborn* for the petition.

Sir *Edward Sugden*, *contrà*.—*In re Knight.* L. C. May 31. 1831.

VICE-CHANCELLOR'S COURT.

MINING COMPANY.—BREACH OF TRUST.

The directors of a mining company are trustees for the shareholders, and are personally responsible for the misapplication of the funds of the company.

In this case the plaintiffs, who were shareholders in the Arigna Mining Company, filed a bill against the defendant, Sir Wm. Congreve, Joseph and Henry Clarke, and others, directors of the company, to compel them to refund a sum of 15,000*l.*, alleged to have been fraudulently obtained from the members of the company. It appeared that a Mr. Flattery had an interest in the Arigna mines to dispose of; and that, after a negotiation between the defendant, Sir W. Congreve, and J. and H. Clarke, and Mr. Flattery, Sir W. Congreve and J. and H. Clarke purchased Flattery's interest for 10,000*l.* Sir W. Congreve and J. and H. Clarke, however, did not acquaint the company with this transaction; but two conveyances were afterwards made, the one from Flattery to Sir W. Congreve and J. and H. Clarke, the other from Sir W. Congreve and J. and H. Clarke to the company, which were signed on the 30th of October, 1824. In November following, a meeting was held, in which another defendant, Duncan, was in the chair, and Clarke and other defendants were present. It was then resolved that the solicitors of the company be directed to complete the purchase of Flattery's interest in the mines for the proprietors of the company at 25,000*l.* In these conveyances no mention was made that 10,000*l.* only had been given to Flattery; but it purported to have been a con-

* See, in particular, vol. i. pp. 180. and 289—291.

veyance from him to Sir W. Congreve and J. and H. Clarke, for 25,000*l.* A meeting was subsequently held, on January 1. 1825, the defendant, Sir W. Congreve, in the chair, and it was then stated by the solicitor to the company, that the deed of conveyance by Flattery to the trustees had been executed, and that the deed of conveyance to the company was engrossed, and in the course of being signed; and that checks to the amount of 15,000*l.* were drawn on the bankers of the company on this very day, when it was represented that the whole 25,000*l.* had passed to the hands of Flattery. The checks were signed by the defendants, Duncan, Power, and four others, so that it was quite clear that they must have known the actual disposition of the whole of the money for which those checks were drawn. It was the duty of the directors of the company to see that as between them and Flattery and the members of the company, the money should be applied in the manner it was really held out to the subscribers to be. They had not, however, done so; but, on the contrary, in January 1825, there appears a statement of certain things done, but no clear account of what took place.

The *Vice Chancellor*, after stating these facts, then said, that the statement in Sir W. Congreve's answer, that the sum received by them was profits they were entitled to, was utterly vain. A technical objection had also been raised, that the transaction was good because the mines were worth 25,000*l.*; but the question of value was not material. If there was a misrepresentation, the persons making that misrepresentation must make good the consequences. It had been also said, there was no company; but a company was about to be formed; and the defendants took on themselves the characters of trustees for all persons who were then, or who should become, members of the company, for certainly from these persons the 25,000*l.* was to come. Though in strictness of law there existed no company, yet the equitable consideration still existed for the protection of those who might become members through the instrumentality of the directors. With respect to the restitution of the property, the company having been formed by act of parliament, which directed there should be a certain capital, there can be no relief, except by making those who improperly subtracted 15,000*l.* from the funds of the company refund the same. There was no difficulty as to the persons who were to share the property. The act of parliament never contemplating a defalcation of the capital, so long as any members remained, it was quite obvious that the persons who now were, or who should become, members of the company, were entitled to the benefit of this suit. I declare, therefore, that defendants, Sir W. Congreve and Messrs. Clarke, should repay the whole 15,000*l.*; that as against defendant Boobyer, the bill of the defendant should be taken *pro confesso*, he being out of the jurisdiction of the court; that defendants Power and Cortes, having paid a part into court, should pay the remainder; and that the bill should be dismissed as to defendants Bent and Boogden, on payment of costs; and that the assignee of Duncan, having defended the trust, should also pay costs. — *Hitchins and another* v. *Sir W. Congreve and others.* V. C. May 30. 1831.

COURT OF KING'S BENCH.

(*Before the Four Judges.*)

ATTORNEYS' SIGNED BILL.

It is sufficient for attorneys in partnership to sign their bill in the name of the firm, instead of their Christian and surnames.

This was an action against the defendant for the amount of a bill of costs for business done by two attorneys in partnership. The bill was signed "Smith & Jay," and the plaintiffs at the trial obtained a verdict.

A rule for a new trial had been conditionally granted, on the ground that the bill ought to have been signed with the Christian as well as the surnames.

The *Court*, after hearing the point argued at some length, were of opinion that the signature of the surnames was a sufficient compliance with the statutes of 3 James 1. c. 7., and 2 Geo. 2. c. 23. Their Lordships also observed that this method of signing by attorneys was extremely common; and that in some instances, as in the case of partnerships, the identity of the persons intended to be pointed out as the attorneys was more immediately intimated by the name of the firm, than if the christian name of each partner had been prefixed. *Smith and another* v. *Brown.* T. T. 1831

BIRTH. — SETTLEMENT. — EVIDENCE. — PARISH SETTLEMENT.

Where a pauper's name was Sharpe, *and christening register of a person named* Sharfe *was grounded to show the time of birth: — Held, that this was evidence of the time of birth on which the sessions might act.*

To prove a birth settlement, the copy of the parish register of christening of St. Catharine's was given in evidence. The name in the register was Alexander *Sharfe*, son of John Andrew and Mary Sharfe, age 25 days. The pauper stated his name to be Alexander *Sharpe*. The pauper had been removed by a vagrant pass 15 years before, to St. Catharine's in London, but could not say that it was to the appellant parish. The sessions confirmed the order of removal from Chester to St. Catharine's.

Gurney contended that this was no evidence and cited *Rex* v. *North Petherton*, 5 B. & C. 580.

Parke J. The sessions are judge and jury. It is impossible to say that this was not evidence to go to a jury; whether the inference drawn by them was right or not is another thing.

The other Judges concurred. Order of sessions confirmed. — *Rex* v. *St. Catharine's, Tower.* E. T. 1831.

APPRENTICE. — AGREEMENT. — STAMP. — ASSIGNMENT.

An assignment of an apprentice in consideration of 8s. does not require a stamp.

The pauper was removed from Hether to Enderby. The pauper was duly bound apprentice by the parish, to one *Dalby*, in 1812; and duly

assigned, April 6th, 1831, to one *Briggs* of *Enderby*, and served till 1815. The appellant parish offered in evidence (to show that the pauper returned and served his father in Hether) an unstamped agreement, by which Briggs, in consideration of 8*s*., agreed that the pauper should go and serve his father. This was rejected by the sessions.

Parke J. You must show that 8*s*. is 20*l*., if you contend that this agreement requires a stamp. This evidence was admissible.

The case was sent back to the sessions to be reheard.—*Rex* v. *Enderby*. E. T. May, 1831.

SETTLEMENT BY APPRENTICESHIP.—SERVICE.

The residence of forty days under an indenture of apprenticeship need not be within the compass of a year.

The pauper was removed from *Hexham* to *Allston*. The question was, whether the pauper gained a settlement by service and residence of forty days under the indenture, the residence not being within the compass of a single year. *Rex* v. *Rustington*, 6 M. & S. 396. *Rex* v. *Denham*, 1 M. & S. 221. *Rex* v. *Findon*, 4 B. & C. 91. *Rex* v. *Brighthelmstone*, 5 T. R. 188. and 2 Bott. 399.

Lord *Tenterden*. This case is precisely the same as *Rex* v. *Gainsborough*. The residence need not be within the compass of a single year. — *Rex* v. *Allston*. E. T. May, 1831.

ATTORNEY'S DUTY.—COMPOUNDING FELONY.

An attorney must not assist on the part of his client in a negotiation for compounding felony.

A rule was obtained, calling on an attorney to show cause why he should not be struck off the Roll, on the ground of his having been instrumental in a negotiation between a prosecutor and a prisoner, his client, for compounding a felony.

Langslow showed cause: *Moody* supported the rule.

Lord *Tenterden* C. J. The Court is of opinion, that it has been shown there was some foundation for the charge. It was not surprising that a man who had suffered a severe loss, should be tempted to prefer his own interest to that of the public; but the Court must take care that professional gentlemen, at least, should not, with impunity, make themselves instrumental in such transactions. There were, however, some mitigating circumstances in this case; and therefore the Court thinks that the ends of justice would be sufficiently answered by only suspending the attorney for twelve months.— *In the matter of* ——. T. T. June, 1831.

STAMP.

Where an instrument secures the payment of three sums of money, the stamp need only be for the aggregate amount.

In this case the question raised was, whether an instrument which contained stipulations for the payment of three different sums, and these sums of money, which were united so as to form an aggregate amount, on which aggregate amount the stamp duty had been paid, was admissible in evidence. It was contended that a separate duty ought to have been paid for each separate sum; and that, in this respect, the stamp affixed was not that which was required by law.

The Court overruled the objection.—*Reed* v. *Wilmot*. T. T. May, 1831.

PARTNER.—CONTRACT.

Where a party entered into a contract with one of two partners, and the partnership was afterwards dissolved; the contract transferred to, and the business carried on solely by, the other partner; and the party then refused to continue the contract with the other partner: Holden, that the latter partner could not sue on the contract, for the remainder of the period for which it was originally made.

Assumpsit for the hire of a carriage. The defendant had entered into a contract with Sharp, a coachmaker in Long Acre, for the hire of a carriage for five years, at seventy-five guineas a year. The third year had nearly expired, when the partnership which existed between Robson and Sharp was dissolved by a decree of the Court of Chancery, and Sharp retired from the concern, after giving every thing up to Robson, and among the rest this carriage and contract. This circumstance was intimated to the defendant by Robson. The defendant, who contracted with Sharp alone, and knew nothing about Robson, waited upon Sharp and stated to him that he was ready to to proceed with the contract with him, but that he would have nothing to do with Robson. Sharp, told him, that he had given up the carriage and all to Robson, and could not himself perform the contract. The defendant then sent back the carriage at the end of the third year, and paid the money for the hire up to that time. The carriage was returned to Robson, on Sharp's refusal to take it. This was at the end of 1826. In 1829, Robson brought his action, in his own name and that of Sharp, against the defendant, for the hire of the carriage during the years 1827, 1828. The defence was, that the defendant had made no contract with Robson, and that Sharp had no right to transfer the contract to another person without the defendant's consent. The plaintiffs were nonsuited, with leave to move the Court to set aside the nonsuit, and enter a verdict for the plaintiffs for 157*l*. 10*s*. A rule to that effect was applied for and granted.

Campbell showed cause against it, on the ground, that the defendant had contracted only with Sharp; and that the defendant was not bound to perform the contract with any one except the person with whom he contracted. Besides, Robson had no right to use Sharp's name as plaintiff.

Lord *Tenterden* C J. It is unnecessary to decide whether Robson had a right to sue jointly with Sharp or not. It is sufficient to observe, that at the end of the third year, Sharp, the only person with whom the defendant contracted, had ceased to have any thing to do with the concern, and had therefore become totally unable to perform his part of the contract; and

he had no right, as against the defendant, to hand it over to another. I think the nonsuit was right.

The other Judges concurred.

Rule discharged.—*Robson and Sharp* v. *Drummond*. E. T. May, 1831.

COURT OF COMMON PLEAS.

DEVISE.— CONSTRUCTION.

A devise to four females, and in case any of them die leaving a daughter or daughters, her share to go to such daughters in seniority, but if any of them should die without issue in the lifetime of certain persons then living, the share of her or them so dying to go to A., B., *and* C. *in succession, all the rest and residue of the devisor's estate to go to one of the four females* (Z.): *Held, that the four females and their daughters took estates for life, remainder of all the estates to* Z. *in fee.*

This was a case sent to the Court of Common Pleas by the Master of the Rolls. Dorothy Axford made her will on the 12th day of October, 1770, whereby she devised and bequeathed all her estates and effects, of what kind soever, to George Low, his heirs and assigns, in trust to pay certain annuities, and from and immediately after the deaths of the annuitants, "then in trust that the said George Low, his heirs and assigns, do and shall pay, apply, and dispose of the rents, issues, and profits of the said messuages, or tenements and premises, unto and equally amongst my god-daughter, Ann Mary Darwin, Mary Low, daughter of the said George Low, Mary Voss, daughter of the said Mary Voss, and Jane Spence, daughter of Mrs. Spence. And I do hereby declare that the said several devisees and bequests herein-before by me made to and to the use of the said Ann Mary Darwin, Mary Low, Mary Voss, and Jane Spence respectively, are and shall be for her and their separate use and benefit, and not liable to the debts or control of their respective husbands. And in case any of them, the said Ann Mary Darwin, Mary Low, Mary Voss, and Jane Spence, shall happen to depart this life leaving a daughter or daughters, that then the share or interest of her or them so dying shall go to such daughters, as they shall be in seniority of age and priority of birth, the eldest of such daughters to be preferred and take before the younger. Provided always, that in case any of them, the said Ann Mary Darwin, Mary Low, Mary Voss, and Jane Spence, shall happen to depart this life without issue in the lifetime of the said Mary Smith, Charlotte Sibbells, Mrs. Spence, and Susannah West, then I order and direct that the share or interest of her and them so dying be paid, applied, and disposed of and to the use of Mary Winsley, Mary Cherrington, Mary Speck, and Diana Fierce, in succession one after another, as they or the said Ann Mary Darwin, Mary Low, Mary Voss, and Jane Spence shall happen to depart this life." The testatrix then appointed George Low executor of her will. She died in December 1770, leaving the annuitants and devisees her surviving, and afterwards all the annuitants died. Ann Mary Darwin, Mary Low, and Mary Voss afterwards died, each leaving a daughter her surviving; and Jane Spence died without issue, and without any heir at law. The cause was heard before the Master of the Rolls in December, 1829, who directed the following questions to the Court of Common Pleas: —

1. What estates passed by the will of the testatrix to Ann Mary Darwin, Mary Low, Mary Voss, and Jane Spence respectively, the limitations to their persons being limitations of the legal estates?

2. What estates passed by the said will to the daughters of the said Ann Mary Darwin, Mary Low, and Mary Voss respectively, the limitations to them being limitations of the legal estates?

The opinion of the Court of Common Pleas was as follows:—

"We have heard this case argued before us by counsel, and have considered it, and are of opinion that, under the will of Dorothy Axford, the said testatrix, Ann Mary Darwin, Mary Low, Mary Voss, and Jane Spence took estates for life as tenants in common in the premises mentioned in the will.

"That the daughters of the said Ann Mary Darwin, Mary Low, and Mary Voss, also took estates for life in the shares of their respective parents, upon the death of their parents respectively.

"That Ann Mary Darwin took the remainder in fee in the whole of the said premises."

N. C. Tindal.
J. A. Park.
J. Gaselee.
E. H. Alderson.

C. P. E. T. April 20. 1831.

On June 28th this case came on before the Master of the Rolls, and he expressed his concurrence in the opinion of the Court of Common Pleas. The case is also reported, 7 Bing. *535.*

ANSWERS TO QUERIES.

COSTS BEFORE ACTION.

The answer to the question of your correspondent, will, I think, be found in p. 13. of the Supplement to Mr. Tidd's Practice, where, in treating of the subject of tender, he cites the case of *Briggs* v. *Calverly*, 8 Durnf. & E. 629., in which it was holden, that the tender of a *debt*, made after an attorney had instructions to commence an action, and had applied for a *latitat*, and consequently after *costs* had been incurred, was an answer to the action.* See also *Moffat* v. *Parsons*, 5 Taunt. 307. 1 Marsh. 55. S. C.

Y. Z.

INSOLVENCY.

1. If this was really an hostile action, and the horse was delivered *bonâ fide* for the purpose of staying proceedings, I apprehend *A.* would be allowed to retain the proceeds of the sale. The 32d section of the insolvent act, 7 Geo. 4. c. 57. (which statute I presume your querist means by the 32 Geo. 4. c. 57.) extending only to *volun-*

* Another correspondent, W. H. M., has referred to the same case.

fury conveyances, transfers, &c. it would be left to the jury to say, whether, under the circumstances of the case, the delivery was voluntary on the part of the insolvent; for if not voluntary, it would not be fraudulent.

G.

INSOLVENCY.

2. The whole of this question depends on whether the payment was voluntary or not on the part of the insolvent. If it was voluntary, the assignees can recover it back; if not voluntary, they cannot. The words of the act 7 G. 4. c. 57. § 32. are these: — "If any prisoner, &c. shall, &c., being in insolvent circumstances, voluntarily convey, assign, &c. &c., such conveyance, &c. shall be fraudulent and void, &c., provided, &c. made within 3 months, &c." Now, in this case, the being in insolvent circumstances at the time of payment, and the payment being made within three months of imprisonment, are admitted; all that remains is — was the payment made voluntary by the insolvent or not? and this seems to be in all cases a question for a jury.

In *Troup*, assignee of *Potter* v. *Brooks and others*, (4 Car. and Pa. 320.) the insolvent had paid money to an attorney for defending two actions brought against him, the attorney having refused to go on without money. Afterwards the insolvent's assignees brought an action against the attorney to recover back the money, but the jury found that the payment was not voluntary. It is more than probable that, in the case in question, the jury would find the payment to be not voluntary, as the insolvent did it to escape an immediate prison.

The compilers of the Insolvent Act have very wisely left the meaning of the term voluntary, as applied to every particular case which may arise to be determined by a jury. Had they defined and limited its meaning, innumerable frauds would have been invented to evade it, but now all these can be met and defeated by a jury. Nevertheless the 32d section bears very hard upon the merciful creditor, as it obliges him to give up what the insolvent debtor may have voluntarily paid him under a sense of his kindness; while it leaves untouched all that property in the hands of the unfeeling creditor, which he has extorted from the unfortunate insolvent by hard and oppressive usage. Undoubtedly, this section holds out a premium to cruelty, and offers a reward to the unmerciful. J. B. J.

QUERIES.

RELEASE UNDER WILL.

A. lends *B.* 500*l.*, and makes a will in which he releases *B.* from the debt; subsequently, however, he takes a bond from *B.* for the same debt, and dies. Does the release in the will operate as a discharge of the debt, both at law and equity?

J. W.

JOINDER. — PARTICULARS.

B. is indebted to *A.* upon a joint and a separate account; *A.* sues *B. alone*. In what manner can the latter ascertain for what account *B.* is suing, with a view to plead in abatement the nonjoinder of parties, if necessary? An order for particulars would give the information; but that is never made except upon the terms of pleading *issuably*. It would therefore appear, *A.* could recover in such action both the joint and separate claims; as *B.* could not avail himself of the nonjoinder upon trial, but only by plea in abatement.

H. C.

MISCELLANEA.

ATHENIAN JUDGES.

Athens was the great shire town in which all the Courts of Attica were held, and where the causes of the allies also were tried. There was more law business done at Athens than in all Greece besides. Nearly one third of the whole number of citizens sat daily as Judges. Hence it was that Athens swarmed with half-bred lawyers, pettifoggers, quarrelsome, litigious sophists. The daily pay of a Judge was seven cents and a half. Every one on entering received a ticket and a Judge's staff. When the day's work was done, he returned the ticket, and received his emolument. There were ten Courts, each composed of 500, and one regularly in session. Mention is also made of larger courts, composed of 10, 15, or even 2000. Allowing 6000 as the average daily number of Judges in Athens, it is plain that the title must have been more common than in Vermont, and must have cost the state 155,000 dollars annually. — *North American Review, for April* 1831.

ANCIENT LAW REFORMS.

In the 38th of Henry 8 (30 Maii), there was an order made in the Inner Temple, "that the gentlemen should *reform themselves* in their cut or disguished *apparel*, and not to have long beards; and that the treasurer of this society should confer with the other treasurers of the Court for an uniform reformation, and to know the justices' opinion therein, and thereupon to perform the same." Whereupon, in their parliament, held 5 Maii, 1 & 2 Ph. & M., there was a decree made. And in 36 Eliz. it was ordered, "that no fellow of this house should wear either hat or cloak in the Temple church, hall, buttery, kitchen, or garden, upon pain of forfeiting six shillings and eight pence." And in the 38 Eliz. an order was made, "that no fellow of this house should come into the hall with any weapons, except his dagger or his knife, upon pain of forfeiting the sum of five pounds." In 42 Eliz. it was ordered, "that they go not in cloaks, hats, boots, and spurs into the city, but when they ride out of the town." — *Dugdale*, p. 148.

In 15 Hen. 8, in their parliament held 17 Julii, it was ordered, "that none of the society should, within this house, exercise the *play* of aboffegrote, or slyp-grote, upon pain of six shillings and eightpence." — *Ib.* p. 149.

In 42 Eliz. it was further ordered, "that none should be admitted fellow of this society, except he were of good *parentage* and not of ill *behaviour*." — *Ib.* p. 147.

The Legal Observer.

VOL. II. SATURDAY, JULY 16. 1831. No. XXXVIII.

——— "Quod magis ad nos
Pertinet, et nescire malum est, agitamus."
HORAT.

ON THE APPROPRIATION BY THE PUBLIC OF THE PROPERTY OF THE CHURCH.

PUBLIC attention is now becoming gradually aroused to the consideration of a reform in the Church. Meetings and speeches, books and pamphlets, rapidly succeed one another on the subject. It is, perhaps, the most general theme of conversation; the daily topic of the senate; the mental *pabula* of the dinner table; and almost equally engages the thoughts of him who calmly reflects on passing events and future prospects in his study, as of him who loiters out his existence in a club-house. The tables of both Houses of Parliament bend under the weight of petitions relating to tithes. Five bills have already made their appearance, each having for its object the alteration of the present mode of disposing of the property of the Church; and, we doubt not, that before the session has ended, other measures, having a similar object, will be proposed.

All these things satisfy us that a change is at hand. The feeling as to the necessity of some reform in the Church is growing stronger day by day. The stream of public opinion is receiving constant accessions from a thousand tributary sources, and it must soon be too powerful and overwhelming to be withstood. Let us consider for a moment the formidable classes of persons who take but one view on the subject, on whom the present system presses most heavily. The agricultural population are universally opposed to it, and the other persons, payers of tithe, are certainly friendly to an alteration. This feeling, however, is by no means confined to the bosoms of those who are directly affected by the present system: it extends itself to most educated persons of all classes; among whom the opinion has long been current, that the present appropriation of Church property is unauthorised either by the laws of God or of the country; that it poisons the very source of religion, and greatly strengthens the hands of the enemies of the pure faith of Christianity.

Let us not be misunderstood; we are not for despoiling the Church of her possessions, but we are certainly of opinion, that the mode of levying and distributing her revenues is almost the worst that could possibly be devised—that it is alike indefensible in theory as in practice—and that a material alteration in these respects must be made.

It is not for us now to state our reasons for this opinion. They have been given again and again; they have become the axioms of political science; and they can no more be shaken than the demonstrations of arithmetic. This is not the place to repeat, or even to discuss them. It is our present purpose to assume, that the expediency of an alteration is admitted, and merely to examine the legal right to make it. This has frequently been denied; and the denial has been supported by arguments which make up, in vehemence and positiveness, what they want in truth and candour. We have been assisted in forming a conclusion on this point by a pamphlet recently published on the subject by a gentleman well qualified to consider it *; and as we believe his work has been a good deal read and noticed, it will be necessary shortly to mention in what respects we differ from him, and then to proceed with his own views in the matter.

Mr. Eagle has contented himself by endea-

* A Legal Argument, showing that Tithes are the Property of the Public and of the Poor. By William Eagle of the Middle Temple, Esq. Barister at Law. pp. 47.

vouring to prove, that the public may make any disposition of Church property that they please, acting in conformity with the constitutional mode of expressing an opinion. He has not attempted to show in what way the system may be beneficially altered; to propose any plan of altering it; or to show how it may be better disposed of than at present. We do not quarrel with him for this; nor do we even know that he is an advocate for the fanciful doctrine of the specific application of the property of the Church to certain particular classes of paupers in this country: we merely infer this from his title-page, and from certain passages in his pamphlet to which our attention is called by Italics, and from one direct paragraph in p. 18. Now, if he holds this doctrine — and be it understood, we have stated our only reasons for thinking that he does — we differ from him entirely. It would be of little service to the nation at large to make any such partial application of the property: we are the advocates of a reform which will benefit all classes of the community, by the rescue of the Church establishment from the present odium under which it labours; and we strongly deprecate the promulgation of a doctrine so mischievous as the one we have hinted at. So far, therefore, we disagree with Mr. Eagle. We may hereafter treat the subject and the authorities at length, but shall now proceed to consider the grounds of our own proposition, that the property of the Church is the property of the public, and may be dealt with accordingly; and here we cordially agree with most of the conclusions contained in the work we have referred to, and readily avail ourselves of its assistance. We think that we shall be able to prove, that without calling to its assistance the omnipotence of parliament, the legislature may, in conformity to the original institution of tithe and approved precedents, proceed to the remodelling of the present system.

The great argument against the right of the public to remodel the system is, that, as tithes were all originally the donation of particular individuals, they were private property; and that, although there might be a resulting use in favour of the donor or his heirs, yet the public could not touch the property. Now, the error of this argument, which has always been put forward with great pomp and authority, is, that the greater part of all the tithes in the United Kingdom were not given by private donors, but by the act of the state in the reign of King John.

"At the first institution of spiritual benefices, there were no such things in existence as parochial tithes. The original dowry of churches, at the time of their foundation, consisted of house and glebe. The assignment of these was of such absolute necessity, that without them no church could be regularly consecrated: and properly no rectory can be without glebe; for although the glebe may have been in fact alienated from the church, the law will always intend that a rectory has glebe belonging to it.* But it was not requisite that a rectory should be endowed with tithes as well as house and glebe. It is true, that in some cases churches were endowed with particular parcels of tithes, before the establishment of the parochial right; but the law has always made a distinction between these particular endowments, which are termed arbitrary consecrations of tithes, and parochial tithes; and it will be seen that this distinction affords the strongest possible evidence of the different sources from which they respectively derive their origin.

"With respect to the difference between parochial tithes and those which originated in arbitrary consecrations, it is universally agreed that the payment of tithes was in its commencement free and spontaneous; and although it was afterwards enjoined as a religious duty, yet until the establishment of the parochial right, every one was at liberty to give his tithes to any religious or ecclesiastical persons at his discretion †. A rector could no more demand tithes of any of the lands within his parish, without showing a particular title to such tithes by grant or prescription, than he could demand the inheritance of the lands themselves. But in the beginning of the reign of King John, and about the year 1200, all tithes of lands, which were not then vested in any ecclesiastical person or body, by virtue of those arbitrary consecrations which have been already mentioned, were annexed by the general law of the land to the rectories of the parishes in which such lands were situate.‡ For this reason, the right of a rector to all the tithes arising within his parish is usually termed by the lawyers his common law right; and this right is perfectly distinct from those particular interests in tithes which were created by the arbitrary grants, or consecrations of private persons, before the establishment of the parochial and common law right, and which are now denominated portions of tithes. For these portions were never annexed to any rectory; nor do they, either in point of fact, or in contemplation of law, belong or bear any relation to the rectories of the parishes in which they are situate, but are wholly collateral to the inheritance of the rectory. Nor can they be legally united to the rectory; for if a portion of tithes and the rectory should happen to be vested in the same person, for an equal estate in fee, the portion

* *Mabie's case*, Winch. 25.; Gibs. Cod. tit. *Glebe; Edgar* v. *Sorrel*, MS. Bridg. 100. 153.; 1 E. & Y. 369.; Gwill. 435.

† 2 Inst. 641.; Year Books, 7 Ed. 3. 4. 7.; 44 Ed. 3. 5. 22.; Lib. Ass. 268. pl. 25.; Seld. Hist. c. 10. § 2.

‡ 2 Inst. 641.; Seld. Hist. c. 10. § 2., c. 8. § 23.; Degge, p. 2. c. 2.

will not merge in the rectory, but will continue a distinct inheritance. *

"Again, the difference between a title to tithes which were annexed to benefices by the law, and a title to those which were derived from private persons, is very clearly shown by the different manner in which it is requisite that such titles should be alleged and proved. In the case of a rector who sues for tithes under his general common law right, it is sufficient for him to show that he is rector; upon which, by the mere act and operation of law, he becomes *primâ facie*, or presumptively entitled to all the tithes arising within the limits of the parish; and under this title he may recover the tithes demanded in the suit, although, in point of fact, neither he nor any of his predecessors have ever been in the receipt or enjoyment of such tithes. † But a person who claims a portion of tithes cannot establish his right, without showing a special title to the tithes which he claims; for the general common law right of the rector will always prevail against the particular title of a portionist, unless such title be proved by positive evidence. ‡ It may, therefore, be laid down as a proposition which cannot be disputed, that *parochial* tithes, which constitute nearly the whole of the tithes of this kingdom, were given to benefices by the law, and may, consequently, be disposed of by the law."

We further assert, that writers of authority have constantly admitted a right in the state to legislate with reference to the property of the Church; and that in numerous instances the legislature has acted on this right. The doctrine is clearly recognised by the Doctor and Student, Dial. 2. c. 55.; by Sir Simon Degge, Parson's Couns. p. 2. c. 16. and by Thomas Aquinas. It has also been recognised by the legislature.

"The only instances in which the legislature has hitherto interfered to establish a compulsory payment in lieu of tithes, are the statutes concerning tithes of hemp, flax, and madder. The preambles of these statutes are worthy of attention. By the statute of 5 Wm. & Mary, c. 3., and 11 & 12 Wm. 3. c. 16. §, the sum of 5*s.* per acre is substituted for tithes in kind of hemp and flax; because, as it is recited in the preamble of the former statute, 'the sowing of hemp and flax is, and would be, exceedingly beneficial to England, by reason of the multitude of people that are and would be employed in the manufacture of these two materials, and therefore do justly deserve great encouragement; and the manner of tithing is exceedingly difficult, *creating thereby many grievous, chargeable, and vexatious suits and animosities, between parsons, vicars, impropriators, and their parishioners.*' Again, in the statute of 31 Geo. 2. c. 12. for encouraging the growth of madder, it is said, that 'the encouraging the growth thereof in this kingdom will be a saving of a very large sum of money, which is now paid for that commodity, imported, duty free, from abroad, *and will also be a means of employing great numbers of the poor in the winter months*;' and that the ascertaining of the tithe of madder will be the greatest means of encouraging the growth of that commodity in this kingdom.' ‖

"Upon the same principle, all barren heath and waste grounds are, by the statute of 2 & 3 Ed. 6. c. 13., exempted from tithes of corn and hay, for seven years after their improvement and conversion into arable and meadow land.

"These statutes establish this principle,—that it is the duty of the legislature to make such regulations respecting tithes as may be deemed necessary for the public good, and more especially for the encouragement of agriculture, and the employment of the poor; but, above all, for the prevention of animosities between the clergy and their parishioners.

"The provision of the statute of 2 & 3 Ed. 6. for exempting barren heath and waste ground from tithes, has, it is true, become nearly inoperative, through the illiberal construction which it has received in the courts of law and equity; but still, in point of principle, it remains unimpeached as a legislative authority, to show that tithes are an impediment to the cultivation of waste lands; and that where the public interest is concerned, tithes are but a secondary consideration."

Mr. Eagle then proceeds to consider the laws by which the clergy are prohibited from alienating or encumbering the estates and revenues of the Church; but here we find nothing new, and many points are incorrectly stated. It is proper, indeed, to observe that this part of the pamphlet displays great want of care, and but little research. Thus, in p. 29. in the list of statutes restraining the clergy from making any lease, gift, conveyance, charge, or incumbrance, Mr. Eagle omits all reference to at least two important statutes, 13 Eliz. c. 20. and 43 Geo. 3. c. 84., and afterwards refers to the case of *Shaw* v. *Pritchard*, 10 B. & C. 241., (misprinting it *Bower* v. *Pritchard*, and apparently confounding it with *Bower* v. *Pritchard*) ¶, as decided upon the statute 13 Eliz. c. 10., instead of the stat. 13 Eliz c. 20., which is a very different statute. The author also states, that it was decided in the case of *Arbuckle* v. *Cowton* **, that the profits of an ecclesiastical benefice did not pass to the assignees of an insolvent clergyman; but he omits to mention the important fact, that the

* Sir *Ed. Coke's case*, 2 Ro. Rep. 161.; *Futter* v. *Borome*, Godb. 35.; *Sanders* v. *Longdon*, 4 Price, 117.; see *Anon.*, Godb. 45.

† The authorities on this head are too numerous to bear citation.

‡ *Ferrars* v. *Pellatt*, Eyre's MSS. Gwill. 1802.; *Ward* v. *Henzel*, Serjt. Hill's MSS. vol. 17. p. 315.; *Sanders* v. *Longdon*, 4 Price, 117

§ See also stat. 5 Anne, st. 2. c. 12.

‖ This, which was a temporary statute, has expired.

¶ 11 Pri. 103. on quite a different point.

** 3 Bos. and Pull. 321.

legislature has expressly enacted that they shall pass. * In p. 32. he tells us that "the doctrine of *Flarty* v. *Odlam* is now well established." This is untechnical in the extreme. The name of the reporter should have been given, viz. 3 T. R. 681., and the cases establishing the proposition should have also been given, being, among others, *Liddesdale* v. *Duke of Montrose* †, *Stone* v. *Liddesdale* ‡, *Mouys* v. *Leake* §, *Arbuckle* v. *Cowton.* ‖ In the same way, p. 32., he refers to the case of *Steuart* v. *Tucker*, meaning, we suppose, *Stuart* v. *Tucker*, 2 Wm. Black. 1137. We shall supply the deficiency in this part of the subject in our next publication, and shall enquire into the right which a clergyman has to alienate or charge his benefice.

Mr. Eagle next proceeds to state the laws for compelling the residence of the parochial clergy, the maintenance of hospitality, and against pluralities. We shall take his statement of the late acts on the subject, and the cases decided upon them.

"By the statute of 13 Eliz. c. 20. it was enacted, that no lease of any benefice with cure of souls should endure any longer than while the lessor should be ordinarily resident, and serving the cure without absence above eighty days in any one year; and that the incumbent so offending should lose one year's profit of his benefice, *to be distributed by the ordinary among the poor of the parish.* And by the stat. of 18 Eliz. c. 11. it is enacted, that upon any offence by the incumbent against the former statute, whereby he ought to lose one year's profit of his benefice, the ordinary shall grant sequestration of such profits to one or more of the inhabitants, *and that in default thereof the parishioners might retain and keep their tithes;* and the churchwardens were empowered to enter and take the profits of the glebe, and other rents and duties of the benefice, *to be employed to the use of the poor* until sequestration should be granted; and that the persons to whom such sequestration should be committed should justly and truly employ and bestow the said profits, or the true and just value thereof, without fraud or guile, to the uses appointed by the statute, 'upon pain of forfeiture of the double value of such withholden profits, *to be recovered in the Ecclesiastical Court by the poor of the said parish.*'

"The next material statute for promoting the residence of the parochial clergy is 17 Geo. 3. c. 53. The preamble of this statute is as follows:—'Whereas many of the parochial clergy, for want of proper habitations, are induced to reside at a distance from their benefices, *by which means the parishioners lose the advantage of their instruction and hospitality, which were great objects in the original distribution of tithes and glebes for the endowment of churches.*' This is the last statute in which the duties of hospitality and instruction are *expressly* recognised by the legislature; but it is a lasting testimony, or, as Lord Coke would have called it, a notable record, of the principle on which it was founded. There needs no other evidence of the strength of this principle than the bare fact, that it was capable of producing such a preamble after it had fallen into disuse for so many ages.

"Several other acts have been since passed relating to the residence of spiritual persons upon their benefices.§ And by the statute of 57 Geo. 3. c. 199., so much of the former acts as relates to the residence of the beneficed clergy, is repealed. The statute of 57 Geo. 3. does not, however, affect the principle of the former acts, but merely adopts a different mode of enforcing it. It is, therefore, material to advert to such of the judicial decisions relative to non-residence, as are more immediately connected with the maintenance of hospitality. By these it appears that the provisions of the statutes for enforcing the residence of incumbents, for the purposes of hospitality, have been so strictly construed and enforced, that it has been determined that the residence of the rector or vicar in any other house in his parish than the parsonage house, is non-residence within the meaning of the statutes.

"Thus, in *Goodale* v. *Butler***, it was resolved by the Court, 'that the parson ought to abide on his rectory, viz. the parsonage house, and not in another house, although it be within the same parish; for the statute intended, not only for serving the cure, *and for hospitality*, but also for the maintaining of the house and habitation of the parson, not only for himself, but also for his successors, *that they also may keep hospitality there.*'

"So, in *Wilkinson* v. *Allott* ††, which was an action for debt on the statute of 21 Hen. 8. c. 13. for non-residence, it was said by Lord Mansfield, 'The statute of non-residence is a beneficial law; and though a penal one, has received a strict construction against such as have offended. A clergyman, with cure of souls, is bound to attend his duty in person, if he can. By experience it was found that neither conscience nor canon law were sufficient to bind the clergy to a due observance of their parochial duty; *but they left it to be done by poor curates hired at small salaries. It would be a strange argument to say, that persons of that description could possibly maintain the hospitality which the statute had in view, and which ought to be kept up.* The general words used by the act might be satisfied by residing anywhere upon the living. However, authorities as far back as the time of Elizabeth say that that construction does not answer the end; but it must be a residence in

* 7 G. 4. c. 57. § 28., following the stat. 1 G. 4. c. 119. § 38.

† 4 T. R. 248.

‡ 2 Anstr. 533.

§ 8 T. R. 411.

‖ 3 Bos. and Pull. 321.

¶ 43 Geo. 3. c. 84.; 43 Geo. 3. c. 108.; 43 Geo. 3. c. 109.; 51 Geo. 3. c. 115.; 53 Geo. 3. c. 149.; 54 Geo. 3. c. 175.; 55 Geo. 3. c. 147.; 56 Geo. 3. c. 52.; 57 Geo. 3. c. 99.; 1 Geo. 4. c. 6.

** 6 Co. 61. b. †† Cowp. 429.

the parsonage house. It is a remedial and a beneficial law, both for the parish and the successor; and cases have been determined where, though the parson lived within twenty yards of the parsonage house, and though he had a servant who slept in it, yet it was holden not to be a legal and sufficient residence.' " *

The author then proceeds to state the acts of parliament, by which tithes and other hereditaments have been taken from ecclesiastical persons, and transferred to laymen as well as spiritual persons. He first cites the stat. of Edward 2., by which the lands and tenements of the Knights Templars were given to the order of St. John; next, the stat. of Henry 5. relative to alien priories; neither of which is very very important. He then mentions the great precedents on the point, the acts of Henry 8.

" By the next statute, of 31 Hen. 8. c. 13., all the remaining monasteries were given to the king, his heirs and successors, for ever; and by the statutes of 37 Hen. 8. c. 4. and 1 Ed. 6. c. 14. for the dissolution of colleges, free chapels, chantries, and hospitals, all the possessions of such colleges, &c. were vested in the Crown. Every one of these acts contains a saving of rights of all persons, other than the abbots, priors, &c., and *such as pretended to be founders, patrons, or donors* of such religious houses.

" The number of monasteries suppressed in England was 645, 90 colleges, 2374 free chapels and chantries, and 110 hospitals. The religious orders were not only deprived of their real estates, which were of immense yearly value, but their cattle, corn, timber, and their valuable church ornaments of gold and silver, were given to the king. Many of the manors and parsonages appropriate, and a considerable part of the lands and tithes which belonged to the dissolved monasteries, were granted to deans and chapters, and other ecclesiastical persons and bodies; but the far greater proportion was granted to laymen, and made temporal inheritances.

" These statutes of 27 Hen. 8. and 31 Hen. 8., which are commonly called the statutes of dissolution, would be amply sufficient, even if there were no other authorities to the same effect, to establish the right and practice of parliament to dispose of tithes and other possessions of the church, in any manner which may be thought necessary for the public welfare. Indeed, unless this right is admitted, it necessarily follows that the ecclesiastical and lay grantees of the lands and tithes of the dissolved monasteries cannot have even the shadow of a legal title to such lands and tithes The deans and chapters, in particular, are reduced to this dilemma — they must either admit that the legislature has the same power to deprive them of their tithes and estates, and to apply them to other uses, as it had to take them away from the monasteries; or they must acknowledge that they have never had any title to such lands and tithes, and are therefore liable to be called upon to account for the past rents and profits, for as long a period as the law will allow.

" This observation applies with peculiar force to the bishops, and deans and chapters of the new foundation of Henry 8.; that is, the bishops and deans and chapters who were created upon the dissolution of religious houses,† and whose whole possessions consist of lands and tithes which belonged to the dissolved monasteries."

We think we have now made out our proposition. We are glad, therefore, to see the heads of the Church themselves aware of the necessity of coming forward to remodel the existing laws on the subject; and here we shall for the present close our remarks. ‡

* This passage, and, indeed, the whole subject, cannot be better illustrated than by the novel of Joseph Andrews, which shows that the evils of the present system was in full vigour in Fielding's time. Some of his touches are unequalled in humour. Take as an instance the description of Parson Adams.

" His virtue and his other qualifications, as they rendered him equal to his office, so they made him an agreeable and valuable companion; and had so much endeared and well recommended him to a bishop, that, at the age of fifty, he was provided with a handsome income of 23*l.* a-year, which, however, he could not make any great figure with, because he lived in a dear country, and was a little encumbered with a wife and six children." How true also is the description of the rector! " The parson of the parish was at this time at variance with the knight; for the parson had for many years lived in a constant state of civil war, or, which is perhaps as bad, of civil law, with Sir Thomas himself, and the tenants of the manor. The foundation of the quarrel was a modus, by setting which aside, an advantage of several shillings *per annum* would have accrued to the rector; but he had not yet been able to accomplish his purpose, and had reaped hitherto nothing better from the suits than the pleasure (which he used indeed frequently to say was no small one) of reflecting that he had utterly undone many of the poor tenants, though he had at the same time greatly impoverished himself."

† The deans and chapters of the new foundation of Henry 8. are, Canterbury, Winchester, Worcester, Ely, Carlisle, Durham, Rochester, and Norwich. Besides these, he erected five cathedrals *de novo*, and endowed them out of the estates of dissolved monasteries, viz. Chester, Peterborough, Oxford, Gloucester, and Bristol, which were made episcopal sees, as also Westminster; but this last bishopric was suppressed, and the monastery turned into a collegiate church, by Queen Elizabeth.—*Johns.* 54.

‡ See the analysis of the new bills, *antè* p. 148. and *post*, p. 169.

M S

ON THE NEW COMMON LAW RULES OF PRACTICE.

QUERIES ON THE OPERATION OF THE RULES.

1. Is the "third day exclusive before the last day of the term?"* What is called "the last return of the term," seeing that it is the last day in the term upon which an original writ can be returnable? If it be,

2. Does the new rule as to pleading without imparlance relate to declarations delivered, or filed *de bene esse*, or only to declarations delivered or filed *absolutely*? It appears to me to relate to the latter only, provided the first query be answered in the affirmative, as may be shown by the following case:—Suppose a *latitat* returnable on the 23d of November next, that is, the day after "the last return of the term," and served more than six days before the return thereof. By the present practice, a declaration cannot be filed or delivered, on such a writ, *de bene esse*. See the note of Mr. Tidd, Practice, 7th edit. p. 463. If a declaration could be filed or delivered, on such a writ, *de bene esse*, there would be time to file or deliver it "on or before the last day of the term," within the new rule, so as to get a plea of the term; but what is there in the new rule which enables a plaintiff to file or deliver a declaration, on such a writ, *de bene esse*?

3. With respect to the same rule; if the declaration be filed, must not "notice thereof be given on or before the last day of the term" also?

4. Does the rule which orders "that no declaration *de bene esse* shall be *delivered* until the expiration of six days, &c." prevent the plaintiff from *filing* such a declaration before that time?

I. C.

5. By the last of the new Rules of Court, if any declaration in *assumpsit* thereafter filed or delivered (on a bill of exchange or promissory note, &c.), *and to which the plaintiff shall not be entitled to a plea as of last Trinity term*, shall exceed in length such of the forms in the schedule annexed to the rule as shall be applicable to the case, no costs of the excess shall be allowed to the plaintiff if he succeeds; and such costs as the defendant shall incur by the excess shall be allowed to him: and further, that on the taxation of costs as between attorney and client, no costs shall be allowed to the attorney in respect of such excess; and in case costs shall be payable by the plaintiff to the defendant on account of such excess, the amount shall be deducted from the attorney's bill.

Now, Sir, I am in a situation evidently not contemplated by the Judges who signed the new rules, and for which, therefore, no provision is made. In last Trinity term, before the rules appeared, I commenced an action against a Peer on a bill of exchange, of course by original, with the usual count on the bill, and the common money counts. I have proceeded to *distringas* for want of appearance. He will probably appear next term, and I shall then have to declare against him. My declaration must, I conceive, correspond with the original writ, as heretofore; and yet, as my client is not entitled to a plea of last term, I am not to be allowed for several folios which I could not safely omit, and upon which I must pay entries; and I may have to pay the defendant costs for doing what it was my bounden duty to do. Whether the amount be great or small, the principle is the same, and the case is one of great hardship. There are, no doubt, many others in the same situation; and if you will call the attention of the profession to this subject, the Judges may perhaps be induced to explain that they do not intend the new rule to apply to cases so circumstanced. H.

* *Vide* 1 Wm. 4. sess. 2. c. 3. § 2.

ON THE REMUNERATION OF ATTORNEYS.

THE great expense attendant upon a suit at law has, for a long time, occasioned complaints both loud and deep. The debtor of a few pounds has thought himself most severely punished for an inability, at the moment, to meet his engagements, when, at length, his coffers have been drained, by a bill of costs, to double or treble the amount of the original claim: nor has the creditor evinced less chagrin, when obliged to risk, in preliminary outlay, a sum equal to most ordinary debts, and exceeding many that are of import to the trader. Now, although, as will hereafter be more formally admitted, the costliness of litigation is, indeed, great—so great as to justify complaint and call for amendment: yet, upon this subject, the half-informed have exaggerated, and the credulous and unthinking have concurred; whilst a topic so pregnant with promise has been eagerly seized upon, and amplified, by superficial praters and small dabblers in penmanship. To say nothing of the general and vague declamation, both by way of harangue addressed to the ears, and of letterpress assailing the eyes of mankind, to which a far too implicit credence is nowadays given by an intelligent but unsuspecting community, in which the vain or mercenary watchers of the "*aura popularis*" are ever ready to indulge, and of which the law, in its various branches, has not a niggard share;—passing this by, let us bear in mind this simple, important, and undeniable fact,—that in the selection of cases exemplifying the enormity of costs, those have been almost invariably produced, in which the plaintiff's claim was small, and where, consequently, the *proportion* borne by the expenses to the subject-matter in dispute has been of the most unfavourable description.

There is nothing in the nature of things, and certainly not in the particular laws of this country, to render a suit instituted for the recovery of 10,000*l.* one whit more expensive than another in which 40*l.* only are at stake; — and yet every one perceives, in a moment, the different effect likely to follow from the mention of any given amount of costs, in connection with one of these sums rather than the other. The having been compelled to pay 50*l.* or 60*l.* for litigating one's liability to the less claim, would, if related as an independent fact, sound very hard; whilst few would regard the same cost as excessive, when spoken of in relation to the larger amount. It can scarcely be needful here to remark, that neither the difficulty of ascertaining the facts of a case, nor the legal complexities which those facts shall involve, in the least depends upon the value of the thing in dispute; and that, consequently, if equal laws are to obtain, such disproportions as that above alluded to are not calamities to be deplored, or evils of which we should attempt to get rid, but rather consequences which common sagacity foresaw, and which common equanimity may endure. At the same time, if these facts were more generally adverted to, some furious and wholesale law-reformers might, from the study, acquire a greater degree of preciseness of information and coolness of judgment, enhancing thereby their present qualifications for the office that they have assumed. The only question, indeed, that can be reasonably put in reference to the lessening of law expenses, is not, What proportion do costs, at present, bear to the sums in dispute?—but, Can these expenses be reduced without the consequent occurrence of an evil greater than the benefit of the diminution? And to this general question it is impossible otherwise to reply than in the *affirmative.*

Our present object, however, is not to show *how* that desirable result might be accomplished, but to prove that, in endeavouring to bring it to pass, the *remuneration of the attorney should not be diminished.* The attorney, although, as a principal labourer, the most worthy of hire, sustains, nevertheless, a much more thankless part, in relation to the bill of costs, than any of those who so abundantly share in its contents. The sinecurist of gentle blood receives his annual tribute of thousands, levied upon those luckless pilgrims who journey to the shrine of justice; but he sees not the countenances of those from whom his emoluments are wrung, and but rarely hears their dissatisfaction vented in faint and distant murmurs. The working deputy of this aristocratic partner in the profits of a suit is known to be a mere instrument, having neither participation nor interest in the exactions; and he is, therefore, treated with just as much scorn, and suspicion, and acrimony, as one in a collected mood would evince towards a missile with which it had chanced to him to have been struck. The pleader is so moderate in his demands, that flinty indeed must be that man, plaintiff or defendant, who would grudge his pittance. That, however, is paid by the attorney, who best knows how it has been earned. The barrister, too, comes in contact only with the attorney, by whom the brief fee is marked optionally. Thus, until we arrive at the attorney himself, all are paid through the convenient intervention of an agent; and such whose exertions deserve recompense receive it from others, who are able to appreciate their merits.

All these payments, however, and all the other numerous outlays in the course of a suit, are inserted in one bill, in which the client is made debtor, and the attorney sole creditor. This bill, long as indeed it may be, from the established mode of procedure, which multiplies minute charges, the attorney presents to his employer. The latter, too often, merely glances at the length of the document, and the names of debtor and creditor, pays it with a bad grace, looks at a length more than usually prolonged, grumbles at the expense of going to law, and, departing, afflicts his friends for a twelvemonth by descanting upon the exorbitancy of attorneys; nay, it may be, instead of entertaining esteem or gratitude towards an able and honourable man, he stupidly changes his attorney, in hopes, as he expresses it, of more lenient treatment! This, as every practical man must be well aware, is no fanciful picture, but represents that which is of daily occurrence; and shows how it is, that undistinguishing persons complain of "attorneys' charges," whose real sorrow arises from the "costs of a suit," than which two things, as we have seen, no other two can be more distinct.

In speaking of a fair remuneration to a man for his labour, it is quite clear that there are two things to be considered, namely, the kind of labour, and the quantity of it actually performed. And by the kind of labour, in connection with its reward, we do not generally intend the utility of the work; for, then, those who practise the most common and simple mechanic arts would be held entitled to the

highest recompense; since it would be far easier to dispense altogether with such complicated laws as afford scope for study and learning, than to live without the labours of the mason, or carpenter, or tailor. But we rather understand, by these terms, the relative degree of previous preparation that must have been gone through, and of present ability which must be exercised, in order to the proper performance of any given offices. No one will deny that the professor of any science or art, who should have been obliged, in order to qualify himself, to traverse remote regions of the globe, and to undergo a protracted seclusion of study at home, would fairly challenge a much higher compensation for any supposed quantity of labour, than a rustic cow-leech, who had gathered his entire stock of lore within the narrow precincts of his native hamlet, and *that* between the ages of twelve and sixteen. Nor is it more to be questioned, that the general, whose profound tactics and well-timed energy should have ensured a great victory, would be entitled to a higher day's pay than his humble auxiliary, the brave but unlettered veteran who charged at the bayonet's point. These, it is admitted, are extreme cases; but they suffice to establish the principle (which, indeed, seems little more than a truism), that the greater the preliminary preparation, and immediate skill required, in that proportion should the remuneration for labour be increased.

What, then, is the condition of the attorney in this respect? Regarding the sort of school-education which an attorney may be presumed to have received, the five years' clerkship which he must have fulfilled, and the other usual incidents to the completion of his studies, it will appear that an attorney can rarely commence practice before the age of three and twenty. He must have been maintained, up to that period, in the rank of a gentleman; a large duty must have been paid to government, and considerable premiums to professional men for instruction; an expensive library must have been purchased; and then, however good his connections, the young practitioner must probably wait two or three years longer, ere he can consider himself settled in practice, or be able to clear his current expenses. Thus, after an outlay, upon a moderate computation, of not less than from 900*l.* to 1000*l.* from the commencement of his clerkship, and after, it may be, hard and anxious application, the fortunate solicitor, at six and twenty, is able to support himself, and that is all. The period antecedent to this may, therefore, reasonably be termed one of *probation*. Now, if this degree of necessary preparation and outlay be considered in itself, and contrasted with that which attaches to the various occupations which men follow, and the respective rates of recompense be also taken into the account, a test will be applied to what are properly the fees of attorneys, at once just in itself, and to them, even on the score of selfishness most unexceptionable. So far, however, from the compensation to the attorney equalling what this standard would authorise, any one who will take the trouble to dissect a bill of costs will discover that, generally speaking, the attorney is little, if at all, better paid for his labour than a master carpenter or stonemason.

To discover that the simple truth is here stated, it is only requisite to take a bill of costs, to deduct from its amount the sums expended, and the interest upon such sums, and then to compute the time which, on a fair probability, the attorney must have consumed upon the business charged. But is no more skill developed from time to time in the conduct of a suit, than is required to design or construct a table, or to supervise the erection of a garden wall? But one answer can be returned to this question; and those know little of the duties of an attorney, who suppose that a smattering of law, or a paucity of discretion, will suffice him.* The effect of this superior requisite ability is, of course, to enhance the claim to a reward, which, independently of this latter consideration, we have seen to be scanty. Whence, then, the outcry that is said to exist against the excessive charges of solicitors? It may, in part, be accounted for, as we have already explained, by considering that the diminution invoked, and that most justly, is in the gross amount of the attorney's bill; a document containing much more than his own charges, much not half so defensible, some things utterly to be scouted, but over which the attorney cannot exercise the slightest control. Something may also be attributed to the effect produced upon vulgar minds by that sort of mob prejudice, which even now exists against the characters of lawyers which we have formerly† traced to its source, and proved to be unfounded. It is not, perhaps, quite so easy to answer the further question—how it has come to pass that the occupiers of *high places* have, on a recent occasion, but too unequivocally countenanced the error in the course of certain "new orders," in

* See Leg. Obs. vol. i. p. 131.

† See Leg. Obs. vol. ii. p. 39.

which a wrong—unintentionally doubtless—is inflicted upon the attorney, and the hopes of the client at the same time are mocked. That this has been done we may on a future occasion briefly prove, and then endeavour to assign — the "why," with all due reverence, we hope, but at the same time with the fearlessness of truth.

A

NEW BILLS IN PARLIAMENT.

CHURCH REFORM.

ANALYSIS OF A BILL INTITULED "AN ACT TO RESTRAIN AND REGULATE THE HOLDING OF PLURALITY OF DIGNITIES AND BENEFICES BY SPIRITUAL PERSONS."

THE bill recites, that it is expedient to alter and amend the laws now in force for the restraint and regulation of the holding of plurality of dignities and benefices by spiritual persons, and to make new and further provisions for the restraint and regulation thereof.

It is therefore proposed to repeal so much of the act of 21 Henry 8., whereby spiritual persons were abridged from having pluralities of livings, and from taking of farms, &c., as declares, that if any person having one benefice with cure of souls, being of the yearly value of eight pounds or above, accept any other with cure of souls, the first benefice shall be adjudged in law to be void; and so much of the said act as enables spiritual persons being of His Majesty's council to purchase dispensation, and take three parsonages or benefices with cure of souls, and enables other spiritual persons, being respectively the chaplains of the persons therein named to purchase dispensation, and keep two parsonages or benefices with cure of souls.

The bill then proposed that it be enacted as follows:—

That no person hold two deaneries, prebends, canonries, precentorships, treasurerships, subdeaneries, chancellorships, or other dignities, wardenships, or fellowships.

That no person hold two benefices with cure of souls.

Provided that spiritual persons, having obtained licence or dispensation, may hold two benefices, if the distance between them do not exceed thirty miles.

Power for the Archbishop of Canterbury to grant licence or dispensation, where the joint annual value of the two benefices does not exceed a certain sum*, with an extension of the power for holding another benefice, in favour of His Majesty's chaplains, and of doctors and bachelors of divinity or law, and masters of arts.

In case of refusal by the Archbishop to grant licence or dispensation, application may be made to the Court of Chancery.

Proviso for confirmation by His Majesty of the dispensation granted by the Archbishop of Canterbury.

* This sum is not yet inserted in the bill.

Power to the Archbishop to revoke licences, in case the conditions and restrictions are not performed; and the benefice first taken shall be void, unless otherwise ordered on appeal by the Court of Chancery.

Proviso in case of benefice becoming void by the revocation of licence or dispensation, or by dispensation not being confirmed by His Majesty, the same shall not lapse for six months.

The annual value of benefices to be estimated according to net annual income, deducting stipends and other permanent charges, but not stipendiary curates, or taxes and rates usually paid by tenants.

The form and contents of the application for licence or dispensation are set forth in the bill.

The Archbishop may order distances between benefices to be measured, at the expense of the person applying for the dispensation.

The word "benefice" to comprehend all rectories with cure of souls (except rectories that have vicars endowed), vicarages, donatives, perpetual curacies, whether augmented by Queen Anne's bounty or not, and parochial chapelries, and whether such curacies and chapelries have cure of souls or not.

All donatives and peculiars (except the peculiars of an Archbishop or Bishop) shall be considered as belonging to the dioceses in which the same may respectively be locally situated.

The act to extend to England and Wales.

ANALYSIS OF A BILL INTITULED "AN ACT TO EXTEND THE PROVISIONS OF AN ACT PASSED IN THE 29TH YEAR OF THE REIGN OF HIS MAJESTY KING CHARLES THE SECOND, INTITULED, 'AN ACT FOR CONFIRMING AND PERPETUATING AUGMENTATIONS MADE BY ECCLESIASTICAL PERSONS TO SMALL VICARAGES AND CURACIES;' AND FOR OTHER PURPOSES."

The bill recites the 29 Car. 2. c.8., intituled "An Act for confirming and perpetuating Augmentations made by Ecclesiastical Persons to small Vicarages and Curacies," whereby it was amongst other things enacted, that augmentations of what nature soever, granted since 1st June, 12 Car. 2., or which should at any time be granted to any vicar or curate, or reserved by way of increase of rent to the lessors, but intended to be to or for the use of any vicar or curate so making the said reservation out of any rectory impropriate or portion of tithes, should continue, as well during the continuance of the estate or term upon which the said augmentations were granted, as afterwards, in whose hands soever the said rectories or portion of tithes should be, which rectories or portion of tithes should be chargeable therewith, whether the same should be reserved again or not; and the said vicars and curates respectively were thereby adjudged to be in the actual possession thereof for the use of themselves and their successors, and the same should for ever thereafter be taken by the said vicars and curates, and their successors, as well during the continuance of the term or estate upon which the said augmentations were granted, as afterwards; and the said vicars and curates should have remedies for the same, either

by distress upon the rectories impropriate or portions of tithes charged therewith, or by action of debt against that person who ought to have paid the same, his executors or administrators, any disability, or any law, custom, or other matter to the contrary notwithstanding; provided that no future augmentation should be confirmed by virtue of the said act, which should exceed one moiety of the clear yearly value above all reprizes of the rectory impropriate out of which the same should be granted or reserved: and it was thereby also enacted, that if any question should thereafter arise concerning the validity of such grants, or any other matter or thing in that act mentioned and contained, such favourable constructions, and such remedy, if need be, should be had and made for the benefit of the vicars and curates as theretofore had been had and made, or might be had, for other charitable uses upon the statutes for charitable uses.

And then reciting that it is expedient the powers and provisions of the said act should be amended and enlarged.

It is therefore proposed to be enacted, that in every case in which any augmentation shall at any time hereafter be granted, by the master and fellows of any college, or the master or guardian of any hospital, all the provisions of the said recited act, so far as the same are hereinbefore recited and set forth, shall apply to such case in the same manner as if the same provisions (with such alterations therein as the difference between the cases would require) were herein expressly set forth and enacted with reference thereto; but no such augmentation to exceed one half of the yearly value of the rectory or portion of tithes to be charged.

Such augmentation to be granted to any vicar or curate who shall be the incumbent of any church or chapel within the parish or place in which the rectory impropriate shall lie, or in which the portion of tithes shall arise (as the case may be); provided that no such augmentation shall be granted to any other vicar or curate.

The same statute to extend to augmentations made by spiritual persons, colleges, and hospitals, out of lands or other hereditaments.

No such augmentation to exceed one fifth of the yearly value of the lands, &c. to be charged.

No benefice to be augmented beyond 200*l*.

All augmentations to be in the form of annual rents.

Where hereditaments are in lease, a part of the reserved rent may be granted as an augmentation.

In such cases the reserved rent to be considered the yearly value for the purposes of the restricting clauses.

Where hereditaments are subject to a lease not reserving a rack rent, an augmentation may be granted, to take effect on the determination of such lease.

In order to avoid the discouragement of augmentations by the reduction of the fine, power is given to defer the commencement of the augmentation upon a renewal of the lease.

Power to apportion augmentations on future leases.

Provided that no lease shall be so made in severalty, unless the hereditaments demised shall be a competent security for such part of the augmentations as shall be agreed to be paid out of the same, and the remainder of the hereditaments originally charged with the augmentation shall be a competent security for the residue.

And reciting that the provision contained in the said recited act, for limiting the amount of any augmentation, is in terms applicable only to cases where the augmentation shall be granted out of a rectory impropriate, and doubts may arise whether the same is applicable to cases where the augmentation shall be granted out of a portion of tithes; it is therefore proposed to be further enacted, that such provision shall apply to the said last-mentioned cases in like manner as in cases where the augmentation shall be granted out of a rectory impropriate.

And reciting that by the said act it was enacted, that if upon the surrender, expiration, or other determination of any lease wherein such augmentation had been or should be granted, any new lease of the premises, or any part thereof, should thereafter be made without express continuance of the said augmentation, every such new lease should be utterly void; and reciting that it is expedient that the said last-mentioned provision should be repealed, so far as relates to any augmentation which may be granted after the passing of this act; and it is therefore proposed to be enacted, that the last-mentioned provision be repealed.

Ecclesiastical corporations, colleges, and hospitals, holding impropriate rectories or tithes, may annex part of the same to the vicarage or curacy. The yearly value of the premises annexed not to exceed one moiety of the yearly value of the rectory or tithes of which the same are part.

The powers may be exercised repeatedly as to the same premises: provided that, instead of being limited to one moiety or to one equal fifth part (as the case may require) of the clear yearly value of the said premises, the powers shall be limited to such one moiety or one equal fifth part, after deducting therefrom the amount of any augmentation with which the premises may previously have been charged, and (in the case of a rectory impropriate, or tithes or portion of tithes,) the annual value of any part or parts thereof which shall have been previously annexed or settled in trust; and every subsequent exercise of any of the said powers shall be subject and without prejudice to every prior exercise which may have been made of the same, or any of them.

Power to determine the yearly value of any hereditaments for the purposes of this act, by two persons appointed by the archbishop or bishop.

The powers not to be exercised by incumbents of benefices.

Power to rectors or vicars to charge their rectories and vicarages for the benefit of chapels of ease, &c. with the consent of the archbishop or bishop of the diocese, and the patron.

And reciting that by an act passed in the 58th year of his late Majesty King George the Third, intituled "An Act for building and promoting the bu ildin of additional Churches in populous

Places," provision was made, under certain restrictions, for enabling any parish to be divided into two or more distinct parishes; and for apportioning in such cases the glebe lands, tithes, moduses, or other endowments between the respective divisions; and it was thereby provided with respect to every such case, that during the incumbency of the existing incumbent of the parish, every new church intended as the parish church of any division intended to become a distinct parish should remain a chapel of ease; it is therefore proposed to be enacted, that the power last herein-before contained shall not be exercised for the purpose of making an annexation or grant to any chapel of ease situate within any division which under the provisions of the said last-recited act shall be intended to become a distinct parish.

Instruments under the proposed act to be deposited in the registry of the diocese within two months.

Office copies of instruments deposited in the registry to be evidence in all Courts.

Fee to the registrar for depositing, *5s.*; for searching, *1s.*; for office copies, *6d.* per folio of seventy-two words.

That the word "benefice" in this act shall be construed and taken to comprehend rectories, vicarages, donatives, perpetual curacies, parochial and consolidated chapelries, district parishes and district chapelries, and churches and chapels having a district assigned thereto.

This act shall extend only to England and Wales.

ON THE OPPOSITION TO MR. CAMPBELL'S GENERAL REGISTRY BILL, BY ATTORNEYS AND SOLICITORS.

To the Editor of the Legal Observer.

SIR,

ACCORDING to the reports of the public papers, it appears that Mr. Campbell stated, on a recent occasion, that "it was not difficult to account for a part of the opposition which the plan had experienced. An honourable friend of his had just placed in his hands a resolution said to have been agreed to by certain individuals, which stated that *the attorneys and solicitors had a vested interest in all the land in England*, and that Mr. Campbell's bill deeply affected their interest." (*Laughter*).

It seems that either the learned counsel, or the reporter on his behalf, supposes the *abuse of attorneys* to be a popular argument. It reminds me of the instructions which were said to have been given to a barrister on the circuit: "We have no defence to this action, but please to abuse the plaintiff's attorney." According to the newspapers, Mr. Campbell would have been just the person to select for the purpose; for he is evidently not only willing to abuse the attorneys, but, by his conduct on this and a former occasion, thinks that to abuse them is the best way of advancing his cause. If he can get them against him, he is sure to win. Thus he settles it with his conscience, for as an advocate (not as a legislator) he must succeed, "though the Heavens should fall." It is a pity the ingenious idea is not an original one: it was tried once before, and failed.

Mr. Campbell thinks it beneath his dignity to notice any of the serious objections and difficulties which have been urged in numerous publications, and in petitions to parliament; but seizes upon this solitary piece of fabrication or folly, and puts it forward gravely, as the opposition of the general body of attorneys and solicitors; and he takes aim at the understanding of his auditors with this hackneyed arrow, as if it were the best in his quiver. Barbed with calumny, he thinks it will best arouse the slumbering intelligence of "those who keep bad hours;" and at all events, as some people have *risible* faculties, if they have no other, a story to the prejudice of "the rogues of attorneys" is sure to tell.

Perhaps the subject is not worth any formal examination; but I am tempted to request a little space, whilst we look at the report, as furnishing an argument in favour of the measure: "An honourable friend had *just* placed in his hands a resolution, *said* to have been agreed to by *certain* individuals, which stated," &c. And this is the way in which legislative measures are supported! "something just heard, said to be agreed to by certain persons,"—no examination of the circumstances—the idle story immediately repeated—that which originated with a mistaken individual (if it had any real origin) ascribed to the whole body of the profession. Surely this is not a fair and candid way of dealing with the character and interests of any class of society; nor, should I think, a very fit method of carrying a bill through the houses of parliament. However, the anecdote excited laughter. It was a good joke against the attorneys, and it told something in favour of the bill. He who entertains us, particularly at his own expense, is sure to find favour in our eyes.

If Mr. Campbell, however, had attended to the evidence adduced before his own commission, he must have been aware that there could be no concert among the solicitors to oppose the measure; for, on the contrary, many eminent practitioners have come forward to support it, and have given their favourable testimony in its behalf.

It would be ridiculous to contend that the attorneys and solicitors are wholly indifferent to the pecuniary effects of the plan on their future practice; but the Commissioners themselves have stated in their report, that the diminution of the profits of solicitors from the present sources will *not be felt for a considerable time*, and that *afterwards* it will be *gradual*. Now, it is rather a novel charge against them, that they are clamorous, not for themselves, but the next generation: for my part, I have never considered them as distinguished, even in an ordinary degree, by an *esprit du corps*. On the contrary, it is difficult to induce them to take into consideration the interests of the present race of the profession: not one in ten of all the members of any of the law societies will trouble himself to attend a meeting; and those who do attend, invariably exercise their professional habit of

'differing in opinion." To talk, therefore, of the solicitors uniting together to form any general resolution such as Mr. Campbell refers to (if it amount to any thing), is most idle and ill founded.

But the most offensive part of the matter is that the attorneys should be continually brought forward as the chief opposers of law reform, and advantage taken of the misplaced zeal or want of information of a few individuals, to represent their views as the general sense of the profession. I do not deny the right of any of its members to protest against the invasion of the emoluments which he considers he had a right to expect in return for the expense and time he has devoted, and the taxes he has paid for his articles of clerkship, admission, and certificate; but I insist that my brethren at large are not to be held up to public ridicule and animadversion, because these views of personal interest are urged by some individuals. I should have thought the Real Property Commissioners would have defended their plan on higher grounds than such an appeal as their advocate has made to vulgar prejudice and the appetite for slander. I observe by their second report that they have taken into their serious consideration the emoluments of solicitors, and state that "they think it for *the public good* that solicitors should be liberally remunerated for their services. Considering the confidence reposed in them, and the intelligence and skill required from them, it is desirable that they should be men of education, and of honourable feelings, and should occupy a respectable station. In their opinion it would be highly inexpedient that the rank which they hold in this country should be lowered." Thus there does not appear to be any ground of difference between the Commissioners and the great body of solicitors. Why, therefore, should Mr. Campbell think it necessary again and again to repeat these specimens of worn-out slander. If his cause be a good one, let it triumph by fair means, and let him avoid the imprudence as well as the injustice of the course he has twice pursued.

I am, Sir,
Your faithful Servant,
A. S.

LEGAL SINECURES.

To the Editor of the Legal Observer.

Sir,

I am glad to see that you have undertaken the subject of legal sinecures. It will require all your exertions and talent. As a fellow labourer in the same good cause, I beg to send you a list of some of the principal receivers of fees who do little or nothing for them; and I cannot preface it better than in the words of one of your own correspondents:—"Root out and utterly destroy the useless weeds which now disfigure the venerable fabric of our laws. Smite to the uttermost the crew of sinecurists which the law now maintains. A reform of this nature is demanded on all hands; but touch not those who earn a fair and honourable meed by industry and ability the most conspicuous and deserving." * I am, Sir,

Your most obedient Servant,
A Law Reformer.

	£.	s.	d.
Lord *Ellenborough*, chief clerk of the Court of King's Bench -	9625	9	1
Duke of *Grafton*, receiver-general of the profits of the seals in the King's Bench and Common Pleas - - -	4000	0	0
Lord *Kenyon*, custos brevium Court of King's Bench - -	2696	6	6
Hon. *Thomas Kenyon*, filazer, exigenter, and clerk of the outlawries in the Court of King's Bench - - -	1254	9	0
Compensation for other fees -	5462	7	9
Charles Short, clerk of the rules and orders of the Court of King's Bench - -	5172	13	1
William Jones, marshal of the King's Bench prison. Fees -	2814	0	9
William Hewitt, clerk of the papers of the King's Bench prison. Fees - -	1000	0	0
John Henry Abbott, marshal and associate to the Chief Justice of the Court of King's Bench	2665	0	0
Thomas Abbott, clerk at *Nisi Prius* - - -	1000	1	6
John Waters, clerk of the Lord Chief Justice of the Court of King's Bench. Fees. - -	2169	13	5

*** Our correspondent has not discriminated these "fee receivers" exactly according to their merits. Assuming that he states the amounts correctly, we must observe, that some of them are by no means of the insect tribe of the *drones*. Thus the clerk of the rules is a necessary and efficient officer of the Court of King's Bench, and is probably entitled to 1500*l.* a-year. 5172*l.* is certainly a monstrous allowance; but we understand he purchased his office,—a practice to be hereafter abolished.

The office of marshal of the King's Bench prison has its responsibility and labour; and his clerk of the papers should be properly paid: but the sums of 2814*l.* and 1000*l.* are far beyond the scale by which the services of other persons, both in and out of the profession, are estimated.

Then the marshal and associate and the Chief Justice's clerk ought to be liberally remunerated; but a sum little short of 6000*l.* is surely beyond the liberal, and approaches the extravagant.

NOTES OF THE WEEK.

PROCEEDINGS IN PARLIAMENT RELATING TO THE LAW.

For Wednesday, July 6. 1831.

Mr. *Buller*—Bill to exempt from toll, cattle driven on turnpike roads to or from pasturage.

* L. O. vol. 1. p. 180.

Tuesday, July 12.

Mr. *O'Connell* — Bill to repeal the subletting act in Ireland.

Thursday, July 14.

Mr. *Sadler* — Resolution, declaratory of the expediency and necessity of instituting without delay a legal and permanent provision for the destitute and suffering poor of Ireland.

Tuesday, August 9.

Mr. *Ewart* — Bill for abolishing the punishment of death, and substituting a milder punishment, in the cases of sheep-stealing, cattle-stealing, and stealing in a dwelling-house, no person being put in fear therein. [*Deferred* from July 12.]

INCREASE OF COSTS UNDER THE NEW RULES.

The Judges of the Common Law Courts intend, as we are informed, to increase the fees allowed to attorneys in these branches of practice affected by the late rules. It is said that 2*s.* per folio will be allowed for drawing declarations, and the charge for attendances will be increased from 3*s.* 4*d.* to 6*s.* 8*d.*

NEW KING'S COUNSEL.

Henry Wm. Tancred, Esq. of the Western Circuit.

Philip Williams, Esq. of the Western Circuit.

Francis Ludlow Holt, Esq. of the Northern Circuit, Vice Chancellor of the Palatine of Lancaster.

NEW COMMISSIONERSHIP OF BANKRUPT.

The commissionership of bankrupt vacant in the fourteenth list by the death of Mr. Impey, has been filled up by the appointment of Mr. Blunt, the Chancery barrister.

CHANCERY AND BANKRUPTCY REFORM.

The Solicitor General stated, on Thursday last, that there were two bills to be brought into the House of Lords, relating to the Court of Chancery. We understand that one of these relates to the reform in bankruptcy, and is, in all important particulars, similar to the bills brought in by the Lord Chancellor in the last parliament.

ROLLS COURT. — DESPATCH OF BUSINESS.

The *Master of the Rolls* has intimated that after the causes already set down shall be disposed of his Honour will hear such further directions and exceptions as may be set down for hearing before him, and also any original cause in which service of the subpœna to hear judgment shall be dispensed with by the defendant.

NEW PEERS.

We have had for some time an article in contemplation on the subject of creating large numbers of new peers at once, and as to the right to create them for life only, as has been suggested.

We understand that the ministers have availed themselves of the question put to them by the Duke of Wellington respecting the coronation, to hasten that event, in order that they may immediately create a new batch of peers, as is usual on such an occasion.

SUPERIOR COURTS.

LORD CHANCELLOR'S COURT.

CHARITY. — INFORMATION. — GRAMMAR SCHOOL.

When a charter authorises the teaching children "bonis moribus, literis, scientiâ, virtute," *these words do not show an intention in the founder to confine the instruction to the learned languages, but reading and writing may also be taught.*

In this case three informations were filed at the relation of various persons on behalf of the charity school at Ashby-de-la-Zouch, and the main question arising out of them was, whether the school was to be considered as a free grammar school in the original and strict sense of the phrase, or whether it was of a wider nature, and to be considered as a foundation for the inculcation of general instruction. Dr. Curtis, the head master, was the relator of the first information, and to that and the others, the visitors, trustees, and other masters, had been made defendants. A report had been made by the Master, to whom the matter was in the first instance referred, and that report had been embodied in and confirmed by a decree of the Court in the year 1806. The report found the school to be properly of a general kind, and not confined to mere instruction in the learned languages. That decree was acted upon; and the more useful and ordinary branches of education were taught in the school from 1806 to 1827. The object of the first information was, that this decree, — the report never having been excepted to, nor the decree impeached for more than twenty years, — might be rectified; and that the school might be declared to be a free grammar school only. The other parts of the prayer of the information went to the execution of certain leases and conveyances of school property, which it was alleged had been made without the sanction of the Court, to the repairs of certain buildings, to an account of the school funds, and to the fixing the salaries of the respective masters. The *Lord Chancellor*, after

stating these facts, said, that in order to induce the Court to interfere in this information, it must be satisfied that the trustees had committed a breach of their duties. It might be true that there was a ground for some part of the prayer of the information; but if the Court found that such part formed only a small proportion of what he asked, and that he had failed in what was the main object of his application, it would not treat him as a plaintiff in a court of common law would be treated, when, obtaining a verdict, he was therefore entitled to the costs of his suit, but would make him pay the costs of an unnecessary and idle litigation. A decree, which had stood undisputed and unimpeached for twenty years, was not to be reversed unless plain and unanswerable grounds were alleged for its reversal. Its being defective in minor points was no reason for its being reviewed. The expense of repairs was alleged to amount only to 16*l.*; the master of the school was to have, under the decree, advantages which far outweighed that very trifling consideration. He was to be at liberty to take boarders; a privilege of a valuable kind. A person who enjoyed such advantages ought to pay such a trifling sum as this for the repairs of the house in which he lived. The salary which was allowed to the master had been assigned to him by the report; and the person enjoying it ought, therefore, to be the last to quarrel with that report. Persons highly distinguished for their attainments eagerly sought after such appointments as this.

His Lordship did not dispute the right of the parties to bring into court the documentary evidence which had been relied on as to the nature of this school. It appeared that in 1565 the Earl of Huntingdon had endowed the school; and the instrument of endowment, and the accounts and other papers produced from the custody of the trustees, were therefore properly admitted. A free grammar school meant, in the ordinary legal sense, a school in which the learned languages only were taught. But the founder might have meant to call this a grammar school only in the ordinary acceptation of the term, and to include in it the more common, but not less useful, branches of learning. It might be intended to be, as to one part of it, a grammar school; and a school for reading, writing, and arithmetic, as to the other part. Whichever way, however, it was construed, the Master's report might well stand, for that excluded neither. It was, however, expedient to see if this was a free grammar school in the legal sense. The charter had the words "*bonis moribus, literis, scientiâ, virtute.*" These words did not show the intention to exclude reading, writing, &c.; as reading and writing were subservient to these qualities in the scholars. These words also occurred: — "juvenes, pueros, infantes, et parvulos;" and they showed clearly, according to the opinion of the Master in his report of 1806, that the founder did not mean to exclude reading, writing, &c. In 1575, ten years after the foundation, were made the statements which now came to light; and in them, every branch of tuition, except accounts, were admitted. These statutes, in every part of them, favoured the report of 1806; but from the petition of Mr. Curtis himself, it was clear that this was not a pure grammar school. The "notes of history," and the "common places," to be made by the boys, could not mean that they were to be made in the learned languages. The scholars of the second form were to construe the examples at certain intervals; and every night they were to have a lesson in English rules, and in the eight parts of speech, and in Noel's Catechism. It was certain, that though one class was to be taught Latin, others were to learn reading; for mere infants could do nothing else. It was ordered in the school, that none of the chief classes speak English; but the other boys were not prohibited from speaking English, for that language had never been put down as Welsh and Gaelic were. For all these reasons his Lordship agreed in the Master's report of 1806, and dismissed the first information with costs. But it followed as of course, that under that dismissal, all the other parts of the prayer of the information were granted; such as the refusal to take the accounts, &c., and the costs as to these matters were to be allowed out of the estate. His Lordship afterwards said, that he would further consider the matter of costs as to Mr. Curtis. All the parties that were brought before the Court were to have their costs out of the estate. — *Attorney-General* v. *Marquis of Hastings and others.* L. C. June 1. 1831.

KING'S BENCH.

(*Before the Four Judges.*)

BAIL. — ATTORNEY.

An attorney who has ceased to take out his certificate, and to practise, may become bail.

Archbold opposed bail on the ground that he was an attorney.

The bail acknowledged himself to have been admitted an attorney; but stated that he "had not taken out his certificate since the year 1808, and that he had not practised since the expiration of his certificate."

Patteson J. — He could not practise without being re-admitted, and therefore is not within the rule.

Bail allowed to justify.* *Anonymous*, T. T. May 23. 1831.

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* See R. M. 1654. § 1. R. M. 14. 2 Geo. 2. *reg.* 1 K. B. R. T. 24 Eliz. § 8. R. M. 1654. § 1. R. M. 6 Geo. 2. *reg.* 5 C. P.; and *George* v. *Barnsley*, 1 Chit. Rep. 8. The rule in both the King's Bench and the Common Pleas, is, that "no attorney shall be bail in any action or suit depending therein." This rule was intended for the benefit of attorneys, and to protect them against the importunity of their clients. See *Bologne* v. *Vautrin*, Cowp. 828. Doug. 450. *note* S. C. *Mason* v. *Caswell*, T. 26. Geo. 3. K. B. *Rex* v. *Sheriff of Surrey*, 2 East. 181. *Laing* v. *Cundale*, 1 H. Black. 76. *Cornish* v. *Ross*, 2 H. Black. 349. *Fenton* v. *Ruggles*, 1 Bos. & Pul. 356. *Wallace* v. *Arrowsmith*, 2 Bos. & Pul. 49. *Redit, Gent., one, &c.* v. *Broomhead*, 2 Bos. & Pul. 564. *Richie* v. *Gilbert*, 1 Taunt, 164. *note*. *Cakish* v. *Ross* Ib. *Stoneham* v. *Pink*.

PRACTICE COURT.

PROCESS. — VARIANCE. — EXECUTORS. — AFFIDAVIT OF DEBT.

Where the affidavit of debt, and the writ, state the debt to be due to the plaintiff, "executors of," and not "as executors of," and the declaration stated it to be due to them in their own right: Holden, no variance.

Addison showed cause against a rule obtained by *White*, for setting aside proceedings for irregularity, on the ground that the declaration did not correspond with the affidavit and writ; the latter describing the plaintiffs "executors of," &c., and the declaration being general in their own right. He contended, that though the process and affidavit stated that the plaintiffs were executors, yet as they did not state that plaintiffs sued *as* executors, the declaration was correct; it being general, and not stating a cause of action which accrued to them *as* executors. This, he said, would be a variance; and he cited the case of *Henshall* v. *Roberts*, 5 East, 150., where error was brought for misjoinder of counts; the first count showing a cause of action which accrued to the testator in his lifetime, and the last stating a promise to the plaintiff, "executor" not stating "*as* executor;" and it was held, that there was a misjoinder; for "executor," without the word "as," was merely description, and would not prevent the plaintiff from proving a cause of action which accrued to him in his own right*; and therefore he contended, that in this case, the words "executors of," &c. in the affidavit and writ, were only description, and did not necessarily import that the cause of action accrued to them in their representative character. On the contrary, the affidavit showed that the bill of exchange on which the action was brought was indorsed to the plaintiffs after the testator's death; and consequently, though the affidavit and writ stated the plaintiffs to be executors, and the declaration did not do so, still there was no variance, as the writ, affidavit, and declaration, were all general.

White, in support of his rule, submitted that it was never usual to state in the writ that the plaintiffs sued *as* executors, and it had been always thought sufficient to state them to be "executors of," to show that they were suing in their representative character†; and he cited Tidd, 450. 9th ed., where the rule is laid down in general terms, that though, where the process is general, the declaration may be particular, as well in bailable as in serviceable process: yet, that where the process is particular, as by executors or assignees *as such*, the execution must correspond with it, or it will be a variance.

Patteson J. said that he was not aware that the rule had been ever carried to the extent that Mr. Addison contended for, but he saw no reason why it should not; and he held, that the proceedings were regular, and discharged the rule, but without costs, as the point was new.

Rule discharged, without costs. ———, Executor v. ———. T. T. June 13. 1831.‡

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3 Price 263. In another case, viz. ——— v. *Yates*, 1 Dow. & Ryl. 9., it was holden that a conveyancer engaged in partnership with an attorney of the King's Bench, and sharing in the general profits of the business of the office, though he did not himself practise as an attorney, was not allowed to justify as bail. But it is to be observed, that the sixty sworn clerks of the six clerks in Chancery do not come within the operation of the rule which prohibits attorneys from being bail. *Dutton* v. *Welstead*, 2 Chit. Rep. 77. It may, however, be remarked, that an attorney or his clerk may be put in as bail, though he cannot justify. *Anonymous*, T. T. 1813. 1 Chit. Rep. 714. *note*. If he is not excepted to, he is liable to be sued on his recognisance, ib. But he is entitled to be sued by bill. He may also become bail in order to surrender the defendant immediately, without justification. *Per Cur.* M. 42 Geo. 3. K. B. 2 Blac. Rep. 1180. 7 Moore, 403. C. P. The present Lord *Tenterden*, when Mr. Justice *Abbott*, permitted an attorney who had not practised or renewed his certificate for six years, to justify. *Anonymous*, E. T. 1815, May 16. 1 Chit. Rep. 714. *note*. The decision above reported, as pronounced by Mr. Justice *Patteson*, is therefore in conformity with that of Lord *Tenterden*.

* See 1 Tidd Pr. 328. ed. 9. 1 Archb. K. B. Pr. 34.

† But from the forms in the books, the *ac etiam* appears to be to answer the plaintiff "*as* executor, &c." See Impey, C. P. 91. 7th ed. Tidd's Forms, c. 8. § 36.

‡ There are numerous cases in the books upon the effect of a variance between the process and declaration in the description of the parties suing. The result of them appears to be, 1*st*, That all process is considered *general* unless it is stated in the writ that the plaintiff sued *as executor*, &c., and does not merely *describe* himself *executor*: the above reported case is an authority upon this point, and from the notes to *Rogers* v. *Jenkins*, 1 Bos. and Pull. 383., it appears to have been always so considered. In *Lloyd* q. t. v. *Williams*, 2 W. B. 722., it is said that *Yates* J., in *Canning* v. *Davis*, 4 Burr. 2417., made this distinction, "that though a plaintiff style himself executor, or give himself any other superfluous description in the process, it will not hurt." The title of executor or administrator was considered in 9 Hen. 5. c. 5. as a superfluous addition, by those who thought the writ was good, for they compared it to the addition of Carpenter, &c.

2*d*, That upon *general* process the plaintiff may declare in a *particular* character as *qui tam* or *in auter droit*, &c. *Hainey* v. *Sparing*, Imp. C. B. 233., 1 Bos. & Pull. 383., *Weavers' Company* v. *Forrest*, 2 Str. 1232., *Ashworth* v. *Ryal*, 1 Barn. & Ad. 19.; and this last case overruled a dictum in *Turing* v. *Jones*, 5 T. R. 402., and other cases to the contrary. Therefore, in the King's Bench, the variance is no ground either for setting aside proceedings or discharging bail; but, though in the Common Pleas the proceedings will not be set aside, (3 Wils. 61., 2 W. B. 722.), yet the bail are discharged. *Lloyd* v. *Williams*, 3 Wils. 61.

3*d*, If the writ is special, to answer the plaintiff *as* executor, &c. the declaration must correspond with it; and the variance both in K. B. & C. P. will be a ground not only for discharging bail, but for setting aside proceedings. *Douglas*

ANSWERS TO QUERIES.

REMEDY AGAINST THE HUNDRED FOR BROKEN WINDOWS.

1. In the case put by U.D.O. there is no remedy against the county or hundred: Where, during a general illumination, a mob broke the windows of a house, the uprights of the sashes, &c., and the window shutters in the inside, this was held not a "beginning to demolish or pull down," within the 1 Geo. 1. c. 5. s. 2., (the late riot act). *Reid* v. *Clarke*, 7 T. R. 496.; and see *Burrows* v. *Wright*, 1 East, 615. I am not aware of any case in which a contrary construction has been given to the almost similar clause in the 7 & 8 Geo. 4. c. 51. G. R. F.

2. In answer to U. D. O. I beg to refer him to *Curtis and Another* v. *The Hundred of Godley*, 3 Barn. & Cress. 248., which is the only case I have been able to find that embraces the point in question. A. F.

COSTS BEFORE ACTION.

The tender *cannot* be legally refused, and an action maintained. A defendant, in ordinary cases, not being liable to costs incurred antecedently to the issuing of process. C.

QUERIES.

TENANT FOR LIFE.

A. HOLDS, by devise, an estate for life, with contingent remainders *in fee* to such of his children as shall be living at his death; and if he die without children him surviving, remainder to *B.* in fee. No trustees are named to preserve remainders, and *B.* is in no manner related to *A.* —Could *A.*, the tenant for life, by fine, feoffment, or recovery, or by any of them, destroy such remainders, and acquire a fee simple in himself, so as to deprive *B.* of the estate devised?

SERVANT'S CHARACTER.

Can a clerk or servant compel a master or mistress to give him a character when he leaves his or her service? And in what manner can he do so? I. A. H.

LEGACY.

A testatrix bequeathed as follows:— "After the death of my son *T.*, I give to my daughter *M. H.*, wife of *J. H.*, the sum of 200*l.* out of the money that is in *J.* and *R.*'s hands belonging to me." Testatrix died in 1828; *M. H.* in 1831. *T.* and *J. H.* are both living.

Does *J. H.* (the husband) take any, and what interest in the legacy? or has it lapsed? Q.

MISCELLANEA.

CABOT'S PATENT — DISCOVERY OF AMERICA.

We are prevented, by the nature of our plan, from giving a review of an interesting work just published, which is illustrated by the most important documents from the Rolls Chapel. We shall take an opportunity to notice the manner in which these documents are kept, as pointed out by the author. For the present we extract the following patent, which the author contends "establishes conclusively and for ever, that *the American continent was first discovered by an expedition commissioned to set up the banner of England:*"

"Memorandum quod tertio die Februarii anno regni Regis Henrici Septimi xiii. ista Billa delibata fuit Domino Cancellario Anglie apud Westmonasterium exequenda.

"To the Kinge.

"Please it your Highnesse of your moste noble and habundant grace to graunte to John Kabotto, Venecian, your gracious lettres patents in due forme to be made accordyng to the tenor hereafter ensuyng, and he shall continually praye to God for the preservacion of your moste noble and roiall astate longe to endure.

"H. R. Rex,

"To all men to whom theis presenteis shall come send gretyng: Knowe ye that we of our grace especiall, and for dyvers causis us movying, we have geven and graunten, and by theis presentis geve and graunte to our welbeloved John Kabotto, Venecian, sufficiente auctorite and power, that be, by him his deputie or deputies sufficient, may take at his pleasure VI. Englisshe shippes in any porte or portes or other place within this our realme of England or obeisance, so that and if the said shippes be of the bourdeyn of CC. tonnes or under, with their apparail requisite and necessarie for the safe conduct of the said shippes, and them *convey and lede to the londe and iles of late founde by the seid John in oure name and by our commaundemente.* Paying for theym, and every of theym as and if we should in or for our owen cause paye and noon otherwise. And that the said John, by hym his deputie or deputies sufficiente, maye take and receyve into the said shippes, and every of theym all such maisters, maryners, pages, and other subjects as of their owen free wille woll goo and passe with him in the same shippes *to the seid londe or iles*, withoute anye impedymente, lett or perturbance of any of our officers or ministres or subjects whatsoever they be by theym to the seyd John, his deputie, or deputies, and all other our seid subjects or any of theym passinge with the seyd John in the said shippes to the seid londe or iles to be doon, or suffer to be doon or attempted. Geving in commaundement to all and every our officers, ministres and subjects seying or herying thies our lettres patents, without any ferther commaundement by us to theym or any of theym to be geven to perfourme and socour the said John, his deputie and all our said subjects so passyng with hym according to the tenor of theis our lettres patentis. Any statute, acte or ordennance to the contrarye made or to be made in any wise notwithstanding." . . .

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and Others v. *Irlam*, 8 T. R. 416., 2 Str. 1232., 4 Burr. 2417., *Rogers* v. *Jenkins*, 1 Bos. & Pull. 383., *Murrell* v. *Jowett*, M. S. Arch. K. B. 2d ed. 68.

The same rules hold with respect to *defendants*, and it has been decided, that a defendant may be declared against as administrator, though the process describes him generally, *Watson* v. *Elding*, 3 Brod. B. 4., 6 B. Moore, 66. S. C.

The Legal Observer.

VOL. II. SATURDAY, JULY 23. 1831. No. XXXIX.

——— "Quod magis ad nos
Pertinet, et nescire malum est, agitamus."
HORAT.

BANKRUPTCY REFORM.

We have for some time been anxiously expecting the bill for the alteration of the administration of justice in bankruptcy. Various reasons have been assigned as the causes of the delay; the real one we believe to be, that the plan which the Lord Chancellor proposed in the last parliament has met with such decided disapprobation from so many influential quarters, that he has paused before he would again undertake the risk of introducing it. It has, however, again been brought in by the Lord Chancellor; and in all important particulars, as we stated last week, is the same as the bill brought in in the last parliament, and this appears to us the proper time to mention our own views on the nature of the reforms which are most required.

We firmly believe, that the eminent person now at the head of the law is most anxious to remedy the real evils of the present system; but he will probably be the most ready to admit that his plan was hastily conceived, that the bill was carelessly drawn up, and that it has met with little support from those whose opinions were of importance. We have, therefore, no hesitation in mentioning the great objections to the bill now proposed by the Lord Chancellor, and in then proposing some suggestions of our own.

It has long been admitted that the present administration of bankrupt law is defective, chiefly because the business is so extensive and complicated, that it is extremely difficult to despatch it, and because its details are so embarrassing, that a life is required to understand them. Any alteration, therefore, in the system, although highly necessary and expedient, must be effected cautiously and deliberately. This being admitted, let us see what has been the course pursued by the Lord Chancellor. Hardly had he been in office two months, when he introduced a measure which was intended entirely to destroy the present system, and introduce one entirely different. Not one stone was to be left on another of the former superstructure. New men, from beginning to end, were to be appointed to carry the new system into execution. New Judges, new officers of the Court, new assignees, new rules, new modes of appeal. The whole was to suffer a change. We will not say that these new men were all to be the friends of the Lord Chancellor, because we impute no unworthy motives; but we must say, that the men who, it was understood, were to be appointed, were almost all entirely ignorant of that portion of the law they were to be called to administer. Here then were to be seventy men displaced, who, more or less, did know something of the present system, and about as many others to be appointed who knew nothing of it whatever. This was to be done, as far as we can learn, merely to satisfy the outcry as to the evils of the present system — which outcry, be it understood, we have no wish to stifle — any change, it was said, must be for the better; and here was indeed a change: no one, the most greedy of innovation, could here find fault, if mere change was all that he wanted. We, however, think this was not all that was to be desired.

How, then, was this measure received? Of course it was to be expected that it would meet with opposition. The obnoxious provisions as to the official assignees were at once objected to by all who read the bill; the number of appeals, being no less than four, was also immediately and universally found fault with. Then, again, the compensation clause gave offence: the "aunts and cousins" insisting it must be higher; the common council petitioning against its extravagance. These, however, were mere matters of detail. They might

have been easily altered or modified. It was not to be supposed, that an important change such as this could be introduced without some faults. Had the principle of the bill been sound, these defects would have been of no consequence.

However, it so happened, that far more important objections stood in the way of the measure: it was found that every person who was best acquainted with the subject disapproved decidedly of the plan. It is very easy to say, that an opposition is factious; but the remark cannot always be entitled to attention. When every Judge who had presided in bankruptcy; when almost every person distinguished for his knowledge upon the subject, many of whom would have been directly benefited by the change, gave it as their decided opinion that the measure was a bad one; it is absurd to say that the opposition to it was entirely factious, particularly when it is remembered that the bill was introduced by a man who confessedly was not well acquainted with the existing system. We do not pretend to say, that many persons did not, and will not now, oppose the bill for party purposes; we only say that those whose opinions on the subject were important—the great legal authorities of the country—did not join the opposition from faction, but from principle and conviction.

The great objection to the bill, then, appears to be this — that it is to sweep away entirely the present system, which certainly possesses some advantages, and to substitute one entirely different in its place. The disadvantages of so complete a change must necessarily be considerable, and it has not been made to appear that its benefits will outweigh them. The safe way of effecting an alteration is to innovate as little, not as much, as possible. The advantages of the system to be altered should be retained; the good should be separated from the evil: the tares only should be weeded out; the whole structure should not be indiscriminately demolished.

Now, the more simple and proper course appeared to be, to endeavour rather to remedy the defects of the former plan than to invent a new one. These defects were notorious and palpable. The most grievous, be it admitted, was the mode of appointing the Commissioners. It cannot be denied that many of them were the mere nominees of political power; that they were not chosen on account of their fitness to perform the duties of the office; and that as most of them had other engagements, from holding other offices, or from practising at the bar, they were oftentimes inattentive to the duties of their Commissionership. It must also be admitted, that not a few of the Commissioners were highly qualified for their office. Indeed, when one recollects that Messrs. Montagu, Beames, Belt, Jacob, Swanston, and others, are Commissioners, it must be admitted, that not only are they fit for their situations from their experience and talents, but that they are the best qualified to perform its duties. The best remedy for this defect, then, appears to be plain. Do not sweep away all the present body of men, some of whom, at least, should be retained. Do not substitute an entire new set of men, many of whom are unqualified for such a situation. Remedy the evils of the existing system. Render the office independent of all other duties; retain the most able of the present Commissioners; appoint in future persons the most fitted for the situation; and the difficulty seems to be disposed of. Surely this plan, at least, is better than the one proposed by the Lord Chancellor, which utterly roots out all the men who for the last thirty years have been intimately acquainted with the details of bankruptcy, and have been engaged in its administration; and brings in, in their places, a body of men, who, whatever may be their other qualifications, must be ignorant of the details, and are not remarkable for their knowledge of the principles, of that part of the law which they are called on to administer.

The plan, then, that we venture to suggest, is that the number of the present Commissioners should be lessened, and that the most effective of the body should be retained; and that these Commissioners, thus selected, should devote themselves exclusively to the despatch of the business in bankruptcy. We think that, if this plan be adopted, we shall have a far better prospect of giving satisfaction to the country than if the machinery of the new bill is allowed to come into operation.

We also highly disapprove of that part of the Lord Chancellor's plan which regulates appeals; but this we have already pointed out in former Numbers.*

We have now shortly stated the principal objections to the plan. We understand the bill is the same in form as the one brought in before, and which we printed in the "Monthly Record" for February †, with the exception of some additional restrictions with respect to the official assignees.

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* See *antè*, vol. i. pp. 257. 307.

† P. 69. 72.; and see vol. i. p. 303.

PRACTICAL REVIEW OF THE NEW RULES

FOR THE REGULATION OF COMMON LAW PRACTICE.

We have already given an analysis of the rules of practice, which the Judges, pursuant to the power granted them by the 11 Geo. 4. and 1 W. 4. c. 70. § 11., caused to be promulgated on the last day of Trinity term.* We have published them at full length in our monthly Supplement for June†, and we have also remarked on what we conceived to be their peculiar object and effect.‡ We shall now proceed to redeem the promise we made when we gave an analysis of the rules, namely, to point out the changes which they will effect in the practice of the Courts.

The first rule, which is on the subject of bail, directs,—

"That a defendant may justify bail at the same time at which they are put in, upon giving four days' notice for that purpose, before eleven o'clock in the morning, and exclusive of *Sunday*."

Before this, bail could not be put in absolutely, without the consent of the plaintiff or his attorney (R. M. 1654. § 8. K. B., R. M. 1654. § 11. C. P.) or without two days' previous notice to the plaintiff or his attorney, that on a given day bail would be put in and justified, but was always *de bene esse*. The plaintiff will now have, at least, four days' time to enquire into the circumstances of the bail; whereas, previously, he only had two, where the bail justified when put in, and in the case of added bail; but in the case of the same bail justifying, as those of whom notice had been given in the King's Bench, only one day. (M. 21 Geo. 3. K. B. *Millson* v. *King*, 9 East, 435.; *Morgan's* Bail, 1 Chit. Rep. 308.) In the Common Pleas, however, whether the bail were the same or added, two days' notice was required. (*Teale* v. *Cheshire*, Barnes, 82. 88.; *Nation* v. *Barrett*, 2 B. & P. 30.; ——— v. *Marshall*, 1 Marsh. 322. 1 Tid. Pr. 260. ed. 9.)

As bail may now justify when they are put in, they of course may justify at chambers in vacation.§ This part of the rule is only a recognition in practice of a legislative enactment contained in the 11 Geo. 4. and 1 W. 4. c. 70. § 12. The words of that section are, "that bail may be justified before a Judge in chambers, or in some other convenient place to be by him appointed, as well in term as in vacation, and whether the defendant be actually in custody or not." Before this enactment, bail could not have been justified in term time at chambers without consent; or in vacation, unless the party was in custody. (*Hawkins* v. *Plomer and Hart*, 2 W. Bl. 1064. 43 Geo. 3. c. 46. § 6.; 1 Tid. Pr. 263. ed. 9.; 1 Archb. K. B. Pr. 109. 118, 119.; 1 Dowling's Statutes, 378.) Before the promulgation of this rule, however, it was ordered, under the authority of the 11 G. 4. and 1 W. 4. c. 70., by the Exchequer, that bail should henceforward be justified at a Baron's chambers, and not in court, as heretofore. (Dax. Excheq. Prac. 41.)

This rule, it will be seen, is not compulsory, and therefore the defendant may still put in his bail, give notice of them, and not justify until compelled by exception; and if not excepted to, he may still wait the twenty days for their becoming absolute. The remainder of the rule which we have above in part quoted, only consists of the details rendered necessary in consequence of the change above wrought in the practice.

The next rule is, that

"The notice of bail shall, in addition to the descriptions of the bail, mention the street or place, and number (if any), where each of the bail resides, and all the streets or places, and numbers (if any), in which each of them has been resident at any time within the last six months, and whether he is a housekeeper or freeholder."

Before this, it was only necessary to give the name of the street in which the bail resided *at the time of giving the notice*. It was not *necessary* to give the number of the house, though, if a party undertook to give the number, and he gave it incorrectly, the notice was bad. (*Anonymous*, 1 Chit. Rep. 493. *note*; *Anonymous*, 1 L. O. 191.) It was unnecessary to state whether the bail was a housekeeper or a freeholder. (Tidd's Forms, ch. 12. § § 13, 14. ed. 9.) The regulation as to the statement of the former residence of the bail for six months previous will check, if not destroy, the crime of personation of bail. For the punishment of this offence, see 11 Geo. 4. & 1 W. 4. c. 66. § 11. 1 Dowling's Statutes, 396. *note* (g). The other particulars required by this rule were before necessary to be given in the notice. Where bail justify at the time of putting in the same, difficulties which formerly existed will not now pre-

* 2 L. O. 105. † 2 L. O. 173.

‡ 2 L. O. 115. 130.

§ It may still be doubtful, whether bail may now be justified at chambers during term, as the rule evidently contemplates justification in court in some instances.

sent themselves in assigning perjury on the false representations made by bail when attempting to justify.

The next rule, which directs that in case of exception, the costs of justification, if the bail are allowed, shall be paid by the plaintiff; and if rejected, the costs of opposition shall be paid by the defendant, unless otherwise ordered by the Court or a Judge; is quite new. Before this, if the plaintiff succeeded in the action, he was allowed the costs of successful opposition: if the defendant succeeded in the action, no notice was taken of them. If the plaintiff's opposition were unsuccessful, he was not entitled to any costs, even though he obtained judgment.

The next two rules are the necessary details of the former rules.

The rule requiring the delivery of particulars, in certain cases, at the time of the delivery or notice of filing of declaration, and the details of it, are quite new. We cannot conceive why the limitation to three folios should have been made; when the particulars may be comprised within that extent, the limitation is useless; when they exceed it, the defendant must take out a summons for further particulars: unless they can be comprised within exactly three folios, this limitation will be of no use. Would it not have been better to have required full particulars at once?

The following rule directs

"That upon every declaration delivered or filed on or before the last day of any term, the defendant, whether in or out of any prison, shall be compellable to plead as of such term, without being entitled to any imparlance."

Formerly, where the process was returnable before, but the declaration not delivered or filed, and notice thereof given, four days exclusive before the end of the term *, the defendant, if completely in court, was entitled to an imparlance. (See 2 L. O. 131.)

With regard to the non-signing of judgment of *non pros*, without making a demand of the required pleading, it is to be observed, that previously, in the King's Bench and Exchequer, no demand was necessary, though it was different in the Common Pleas. (1 Tid. Pr. 676. 693. ed. 9. See further remarks, 2 L. O. 131.)

With respect to the rule for decreasing the number of summonses necessary to be taken out before an order shall be made by a Judge, it is to be observed, that before this rule, three summonses and an affidavit of attendance thereon were in general necessary, before a Judge could make an order for non-attendance. (1 Tid. Prac. 511. ed. 9.)

Before the rule prohibiting the delivery of declarations *de bene esse*, until six days from the service of process in non-bailable actions, and from the arrest in bailable ones, the plaintiff might declare *de bene esse* on the return of the writ. (1 Tid. Prac. 419. ed. 9.) The effects of this rule have been sufficiently pointed out at p. 131. of this volume.

With regard to the rule which permits plaintiffs in ejectment to serve tenants on any day before the first day of term, and yet to obtain judgment against the casual ejector of that term previously, the declaration must have been served before the essoign day, or the plaintiff could not have had judgment of the term. (*Roe* dem. *Bird* v. *Doe*, Barnes, 172. 2 Tid. Pr. 1210.) As to declarations served by mistake *on* the essoign day of Trinity term, see 2 L. O. 77.

Before the rule requiring one day's notice of taxation of costs, the party about to tax was not obliged to give a notice, unless the opposite party obtained a rule from the clerk of the rules, or the secondaries, to be present at the taxation, and served it before the expiration of the rule for judgment, when his opponent could not proceed to tax without giving him twenty-four hours' notice. (1 Sellon, 504. 2 Tid. Pr. 990. ed. 9. 1 Archbold, K. B. Prac. 225.)

As to pleading several matters, or making several avowries or cognisances, before this rule, counsel's or serjeant's signature was necessary in order to do so. In all cases in the King's Bench it was a rule absolute in the first instance. In some in the Common Pleas it was a rule *nisi*.†

ANSWERS TO THE QUERIES ON THE NEW RULES OF PRACTICE, P. 166.

DIFFICULTIES enough will arise on the new rules, without the matter being mystified by *T. C.* After I had succeeded in discovering the points aimed at, I found that the sum and substance is this, — that on a writ returnable the last three days of the term, the new rules do *not* authorise a declaration *de bene esse* to be filed; and as they do not profess to do so, I see no great mischief that is likely to arise.

1. The "third day exclusive before the last day of the term," is *not* "what is called"

* R. T. 5 & 6 Geo. 2. (b.) K. B. 1 Tid. Prac. 466. ed. 9.

† 1 Tidd's Pr. 484. Forms, c. 27. § 11. ed. 9.

the "last return of the term;" but *is* "*what is called*" the "last *general* return of the term;" and what then?

2. The new rules *do* apply to declarations *de bene esse* in chief; and, by the by, in fact to all declarations. The observation following this query is an instance of *non sequitur*. And how the case he puts, which proves merely the point above mentioned, supports his opinion, of the rules applying only to declarations delivered *absolutely*, some of your more "assiduous readers" may perhaps discover; I cannot. It appears to me that a declaration *de bene esse*, delivered at any other period in the term, or before (when by the old rules it can be so delivered, which rules the present do not alter), *will* clearly be within the rules; and how the case put by *T. C.*—even of itself a case of doubt—could render doubtful this part of their operation, I leave him to point out.

3. *T. C.* should know that a declaration is *not* delivered until notice *be* given.

4. This same point has before been noticed; but I consider filing and notice as a mode only of *delivery*; and that the Court would not, at all events, allow its rules to be defeated by so palpable a technicality.

H. F. G.

REMUNERATION OF ATTORNEYS.

(*Continued from p.* 169.)

NEW REGULÆ GENERALES.

We have already furnished a true test of the reasonableness of an attorney's remuneration, by applying which, it moreover appears that his exertions in the conduct of a law-suit receive relatively but a scanty recompense. The injustice, however, of lowering the scale of fees, would not confine itself to the body of solicitors, but would operate to the serious prejudice of the whole community, as may be easily shown. Attorneys cannot be dispensed with: their functions, at least, are of such a nature, that in an advanced state of society there must always exist men, under whatever name, answering to the description which is now applicable to solicitors. The greater part of an attorney's duties are fiduciary; and every thing, therefore, which has a tendency to lower him in his own esteem, or that of others—every thing that increases his temptations to breach of confidence—every regulation that is fitted to stock the profession with persons destitute alike of a liberal education and honourable connections—must, so far, deprive the public of valuable servants, and give them up to be the prey of needy and shameless adventurers. Thus, those who advocate most strenuously the public good, and who are eager to merge, in pursuit of that, all private considerations, must nevertheless perceive and allow that in this, as in many other matters, a parsimonious is the worst economy. Yet some have thought, and seemingly not without good reason, that this is the spirit in which the venerable common law Judges have recently conceived a rule that makes a very wide innovation upon antecedent usage; reducing and marring the once fair proportions of our ordinary pleadings. Though *this*, the natural and immediate effect of the regulation, might bring upon it the hearty denouncement of legal antiquarians, when enforced upon a pleader grown venerable amid his books of entries; yet the attorneys, being men of the world, are not given to deplore the destruction of that which is merely ancient, nor apt to bedew their faces because early associations happen to be violated: they war not against the concise wording of declarations, but regard the rule as it will affect their bills of costs, as indicating the present sentiments of the Judges, and as giving an earnest of the manner in which any further power that these personages may possess will be employed.

Upon the attorney's bill the rule in question will have a doubly annoying effect; for, though it will lessen the amount of charge, it will not diminish one jot the practitioner's labour or anxiety. And from this it must not be supposed that the attorney was formerly paid any part of his bill for *doing nothing*. We have before considered that his labours were at no time overpaid; but they were, to a certain extent, remunerated *indirectly*. Thus, whilst for many of his necessary attendances, and for the discharge of duties demanding time, and patience, and skill, he would have been most inadequately compensated by the sums specifically allowed on those accounts, the inadequacy was in great measure made up by a liberal allowance in other parts of the bill. Such parts embraced the charge for common pleadings, which frequently required little more than mechanical application, and which, as sources of emolument, are now utterly destroyed. This mode of payment is fairly open to the charge of complexity, from which the attorneys do not defend it; neither do they object to the simplification of pleadings *in itself*; but they do complain, they have a right to complain loudly, and they ought

to be heard, that their moderate emoluments have been cut down upon the principle of simplicity, whilst that principle is allowed to stop short of the extent to which it would naturally have gone, of ensuring to them sufficient fees for services actually rendered. In order, therefore, to have reconciled the profession to the rule in question, it should at least have been intimated that, in the event of any future appeals from the taxing officers, the Courts would allow generally more liberal compensation, both as between party and party, and as between attorney and client. No such thing having been done, what is the most obvious inference as to the sentiments entertained by the learned framers of the rule? Clearly this, — that they consider the remuneration of the attorney to have been formerly too great, and are consequently satisfied that they do no injustice by diminishing it on the side of form, without adding to it in matters of substance. This opinion, as we have already observed, is avowed by many who do not understand the terms which they employ; and is entertained by some few whom one is in the habit of excusing, *propter simplicitatem laicorum*; but that it should have been harboured by authorities ranking deservedly so high, may astonish some.

The Judges possess a most extensive power in regard of costs: which power may be exercised directly, by prescribing rates of allowance to their officers; and indirectly, by modifying the subordinate proceedings of a suit. The profession do not assume, nor have they ground to do so, that this important authority will be wilfully abused; though it would have been highly satisfactory to them, could they have inferred, from recent demonstrations, that the possessors of so great a power had made themselves well acquainted with facts, and given to those facts a serious, patient, and candid consideration. Had the attorneys been assured of this, they would at least have been able to foretel the nature and tendency of any further steps, in relation to costs, that may be taken by the authorities in the Courts; whilst, at present, an ignorance, not free from reasonable apprehension, overshadows them.

If we turn to the suitors, surely no one who shall be made to understand the means by which it has happened that a suit costs him a pound or two less than formerly, will evince greater readiness than his solicitor to thank the Judges for their well-meant interference; especially when that suitor shall be further instructed that very considerable sums of money, to a certain extent under the control of this same tribunal, are payable to individuals for doing nothing, and that these sums are left to luxuriate upon the bill of costs in all their pristine amplitude! Touching the incentives by which the authors of the rule (excellent in itself, evil only from its solitary condition) have been probably actuated, however readily one may acquit them of any positive ill intent, it is very difficult not to think that they have fallen into the omissive sin of want of sympathy, or fellow-feeling, towards the solicitors; whom it may, perhaps, be no offence to their Lordships to call their professional brethren. We need not to be told that the Judges ought to be eminently impartial, and to regard indifferently all persons with whom they have to do in the administration of justice. That no one can deny; but we speak of a sympathy not inconsistent with the sternest demands of public duty, — a sympathy which would have recalled to their Lordships' minds the propensity of uninformed multitudes to depreciate respectable bodies of men, without knowing why, and the peculiarly exposed position of attorneys in this respect, — a sympathy which would have reminded their Lordships of their own career at the bar, and of the anxious and ill-requited labour, on the part of solicitors, which, as leading advocates, their Lordships must have frequently witnessed, — a manly sympathy, in short, which would have saved them from even the semblance of deferring to an unmeaning out-of-doors clamour, to the neglect of their own sound experience, and the means of accurate information within their reach. Surely, if their Lordships observed (and they are men of discernment) a growing disposition abroad, not only to subvert all payments without labour, but to abridge even the fair recompense of arduous exertion, they were in duty bound, as just men (and that, as politic men, they did it not, may seem a marvel), to have thrown themselves into the breach to arrest the clamour, rather than, by yielding to it in its most senseless and obnoxious form, to have weakened the tenure of certain ample emoluments, to which, or to the consumers of which, their Lordships cannot be suspected of indifference. Surely, if there be a Jonah aboard the ship of the law, by reason of whose sins sore tempests assail her, the commanders should rather search for the reprobate amongst the lumber of the hold, than tear down the active mariners from the shrouds, and, at their expense, attempt to appease the discreet element, which roars for the drones, and which, until they

be forthcoming, will doubtless continue to roar. In the conviction that this want of a just fellow-feeling has been recently exemplified, we may perhaps be somewhat confirmed by adverting to other circumstances which go to countenance the notion of its existence. Why should one man speak of others, who are legally following the same profession as himself, in terms which, in fact, mean that those of whom he speaks deserve to be *tolerated?* And yet my Lord Mansfield, on one occasion, decides, very condescendingly, that attorneys, if they properly discharge their duties, are useful men, and merit the protection of the Court. How exceedingly kind is this! — to recognise judicially the existence of attorneys, and to declare concerning them, what would have been equally true of a bailiff executing the process, or a verger keeping the door of the Court, or, in fact, concerning any subject of his Majesty. There are probably few professional men, who cannot call to mind the more than common fertility of imagination, and acuteness of discernment, which some learned Judges have exhibited in the surmising of frauds and tricks by attorneys, which themselves could never have dreamt of; and the wonderful credulity with which their Lordships have been seized towards the testimony of persons the most worthless, when that testimony has but gone to inculpate members of their own Court. Δ.

OBJECTIONS TO THE PROPOSED ALTERATIONS IN THE BANKRUPT ACT.

To the Editor of the Legal Observer.

SIR,

I HAVE just been favoured with a sight of the analysis of the bill now making its progress through the House of Commons, as given in your publication of the 2d instant (p. 134.). From the observations by which you introduce the subject, I cannot suppose you are at all aware of the extensive effects to be produced by the alterations alluded to, and the mischievous consequences that will ensue, not only to bankrupts, but to innocent and indifferent parties, who have entered into contracts and performed a variety of acts, relying on the provisions of the law as it now stands and is expounded by the Courts.

The preamble of the bill, as a reason for the project in question, states, that "whereas the said act (6 Geo. 4. c. 16.), contains no provisions for making such depositions or office copies of the record thereof evidence." I shall very briefly proceed to show that this is palpably erroneous, and that for all just and general purposes, the present law is sufficiently extensive in its application.

Let us for a moment look at the law as it stood previously to the passing of the 6 Geo. 4. By the 5 Geo. 2. § 41., it is enacted, that "a true copy of the record of such commissions, depositions, and proceedings, or other matters or things, signed, &c., shall and may upon all occasions be given in evidence to prove such commissions, and the bankruptcy of such person against whom such bankruptcy hath been or shall be awarded," &c.

A slight (though to the present purpose perfectly immaterial) alteration on this point was afterwards made (49 Geo. 3. c. 121.), by which, in actions brought by or against assignees, notice of the intention to dispute must be given.

On the passing of 6 Geo. 4., "all things done pursuant to the former act" were confirmed, and the power of enrolment retained, with this additional difference, that the depositions, instead of as before, being only *primâ facie* evidence were to be received as *conclusive* evidence of the matters therein contained. This act was passed on the 2d May, 1825, and did not take effect till the 1st September in the same year; thus, all persons who felt inclined to avail themselves of an enrolment under the old statute received *four months' notice* to do so on the passing of the new one. Those, therefore, who neglected this warning have only themselves to blame, and have no right to call on the legislature to supply a deficiency which, if it exist, their own neglect or indifference alone can have occasioned.

To prove the fallacious pretence under which the 6 Geo. 4. is proposed to be "amended," I need only refer to the 95th section of that act, which empowers the Lord Chancellor to appoint a proper person who shall "enter of record all matters relating to commissions, and have the custody of the entries thereof;" and to the 97th section, which makes office copies evidence.

It is not perhaps generally known to your readers, that more than one decision has been pronounced, by which it has appeared to the Court, that the 6 Geo. 4. confers no power of enrolling depositions which were taken under the authority of the former acts; and not the most trifling reason assigned by the Judges for this opinion is, that it never could be the intention of parliament by an *ex post facto* enactment, to place already declared bankrupts or persons claiming under them in a worse situation than before. The additional importance given to enrolled depositions, by making them *conclusive* instead of *primâ facie* evidence, would have had precisely this effect.

A STUDENT.

DISPUTED DECISIONS.

READMISSION OF ATTORNEYS.

To the Editor of the Legal Observer.

SIR,

I HAVE perused the report of an application to the Court of King's Bench, on the part of an attorney, for readmission, given in the 31st Number of your work, at page 61., and also the observation and opinion of R. J. E. thereon, contained in No. 37. p. 153., under the title of "Disputed Decisions," and I am clearly of opinion that it was intended by the legislature

when the act of 37 Geo. 3. was passed, that if an attorney should by any means *fail* to take out his certificate for one whole year, he should thenceforth be incapable of practising in Court, either in his own name, or in that of any other person, and his admission should be deemed void. And the practice of the Court has ever since been, that where the attorney has not practised on his own account since the expiration of his last certificate, the Court, upon application, and upon affidavit of the facts, and stating the reason of his not having continued to take out his certificate, the manner in which he has since been employed, and that the usual notices have been affixed, &c. in the same manner as upon an original admission, would make a rule that he be *readmitted without payment of fine or arrears of duty.* But where the attorney *has practised since the expiration of his certificate,* the Court would *in no case order him to be readmitted, except upon the terms of his paying all arrears of duty and a fine;* and in this case the Court also would require to be satisfied that the party's not having taken out his certificate arose from the mere *neglect*, or, in other words, *inability* of himself or his agent, and not from *wilful* omission (which implies *improper motive*).

It is clear, therefore, that as the attorney in this case ceased to take out his certificate for two years, and *afterwards* took out his certificate *and practised without readmission*, he was liable to pay *all arrears of duty which accrued since the expiration of his last certificate, and a fine.*

The decision of the learned Judge (*Taunton*) must therefore be *correct.* I feel convinced that the majority (if not *all*) of the readers of the Legal Observer will maintain my opinion: and I am, indeed, surprised that R. J. E. should not have been impressed with the same idea.

Trusting that you will think proper to insert this in your Journal, to show at least one member's opinion,

I remain, Sir,
Your obedient Servant,
J. W.

OFFICIAL ASSIGNEES UNDER THE NEW BANKRUPT BILL.

To the Right Hon. the Lord High Chancellor.

My Lord,

Feeling assured that your Lordship will not be displeased with any remarks which may be made upon your Bankrupt Court Act, I venture to address you, for the purpose of showing your Lordship the inconveniences and expense which, I think, will result from the present form of the first clause, relating to the official assignees.

The clause, as it passed through the Committee of the House of Lords, enacts, "That there shall be an official assignee, who, in all cases, shall be an assignee of each bankrupt's estate and effects, together with the assignee or assignees to be chosen by the creditors; and all *the estate and effects, and the proceeds of sale* of the estate and effects, of the bankrupt shall, in every case, be *possessed and received* by such *official assignee* alone." Now, my Lord, by this clause, the official assignee will be the only active person, and the assignee chosen by the creditors will be a perfect nonentity; which will be the means of deterring many respectable and able individuals from undertaking the office, and thereby the whole management of the affairs of the bankrupt will devolve upon a party who has no interest whatever in their settlement beyond the mere official line of duty. The assignee chosen by the creditors is, generally, either the largest creditor, or a person who is considered by the majority of the creditors to be most competent to manage the affairs of the bankrupt: therefore the creditors will always consult their interest in the choice they make; and if the Court is possessed of the power of appointing an official assignee to *overlook* the proceedings of the other assignees, and to give his advice and assistance on every requisite occasion, I submit to your Lordship that the ends of justice will be fully answered, without placing the whole and sole control of the receipt and payment of moneys in the official assignee.

Again, my Lord, the clause directs, "that all moneys shall be paid within one week after such receipt by the official assignee into the Bank of England, to the *credit of the Accountant General* of the Court of Chancery." Thus, after the money is once paid in, the assignees will possess no control whatever over it; they will not be able to draw out money for the purpose of paying their current expenses, without making an application to the Court; and then, in due course of time, will follow all that attendant train of motions, orders, reports, and confirmations, which has been so long and very justly censured, respecting the payment of money into the Court of Chancery to the credit of any particular cause, and great expense will unnecessarily be incurred.

Now, my Lord, I submit, that the following plan will be much more beneficial to the bankrupt's estate, and much more acceptable to the trading community, *viz.*: That each bankrupt's estate shall have a separate account opened at the Bank of England; that all moneys shall be paid to such account as soon as received; that every time a sum of money is deposited, a note in writing shall be given to the registrar of the Court, specifying the amount; that the registrar shall enter the same in a book to be kept for the purpose; and that when any money shall be required to be drawn out (for the due application of which the assignees alone shall be responsible) a note shall be given to the registrar, stating the amount, and the purpose for which it is required, and the registrar shall then countersign the cheque. By this means, not only will the business be conducted with much less expense, but the accounts will be kept distinct and plain, and every creditor will be at once enabled to ascertain at the registrar's office the exact balance in hand, and in what manner moneys may have been appropriated. The additional expense of keeping these accounts will, I conceive, be very trifling.

This, my Lord, is the view I have taken of the subject,—a view which, I venture to hope, may not be considered altogether unworthy of notice;

and, having drawn your Lordship's attention to it, I shall conclude with remarking, that whether the bill passed in its present form, or in an improved form, the country will owe to your Lordship a debt of gratitude for so modifying the administration of the laws relating to bankrupts as to render the practice certain and invariable: it will be a boon to the honourable but unfortunate debtor — a boon to creditors in general — and a means of preventing fraud and peculation.

I have the honour to remain,
My Lord,
Your Lordship's obedient and very humble Servant,

April, 1831. S. N. R.

ATTORNEYS ADMITTED, TRINITY TERM, 1831.

Our Monthly Record for June will show that the admissions in the Court of King's Bench during the last term, excluding the re-admissions, were 93; making the whole number of admissions in the last four terms 411; which is somewhat less than we calculated.* The public press has therefore been grossly imposed upon by the statement that the annual number exceeded 1400. These statistics of the profession, we trust, will not be useless, in more respects than one, and at all events the reasoning founded on the information previously laid before the public must be obviously fallacious. From the authentic details we have adduced, it appears that the gross increase of attorneys is comparatively small. Let those who are curious on such subjects, and especially those who desire new restrictions on the profession, furnish some data by which the decrease by death, retirement, &c. may be estimated, and we shall then be prepared to consider the necessity of any alteration, regarding which we have received several communications.

CERTIFICATED CONVEYANCERS.

To the Editor of the Legal Observer.

Sir,

The Report of a recent case, in which a person who described himself as a "certificated conveyancer, and a member of Gray's Inn," (but whose evidence was discredited by the jury,) was examined as a witness, affords, it is to be feared, a specimen of the qualifications and practice, if not of the character, of that branch or excrescence of the legal profession. The following is an extract from the Report: —

"In his cross-examination he stated that he had been once a bankrupt, and once an insolvent debtor, besides being twice in prison; but he said they were for debts contracted by others. He had been a conveyancer two or three years, previously to which he had been two or three years a clerk in several attorneys' offices; before that he had been two or three years a land agent in Chelmsford; but he left there because the business did not answer, first paying the greater part of his debts. Before that he was a schoolmaster at Royston. He was assistant at a school at Harlow, in Essex. On being asked the periods when he was a bankrupt, and when an insolvent, also when he left the various towns he had named, he declared his perfect ignorance, or whether any and what dividends had been paid to his creditors."

Now, with the exception of those few certificated conveyancers, who are really candidates for the bar, and whose practice, like that of conveyancers at the bar, consists of advising on titles, preparing special drafts, &c., and who neither have nor seek any other clients than solicitors, it has always appeared to me that the class called certificated conveyancers consists of persons who, having failed in their earlier pursuits, have been tempted by the profits reaped by annuity, money, and bill brokers, to aspire to the designation and privileges of certificated conveyancers. This ambition is very natural; but, I would ask, does it accord with the dignity of the honourable societies of the Inns of Court to admit such individuals as members, who thereby acquire that licence to practice conveyancing, which, in addition to barristers and solicitors, was intended by the legislature to be extended only to the *bonâ fide* candidate for the bar? †

A Friend to Consistency.

TAXATION. — EXTRA COSTS.

To the Editor of the Legal Observer.

Sir,

I have, on former occasions, set forth some of the circumstances which have conspired to create misconceptions with respect to the legal profession; and now proceed to specify another cause, which has also operated disadvantageously.

The bills of costs (with the exception of those for conveyancing) of attorneys and solicitors, must, if the parties who have to discharge them require it, be taxed by the proper officer. To this there can be no objection, if the duty be fairly and ably performed. Without it, indeed, there would be no summary restraint; and those (and some there are) who follow the law merely for the pecuniary compensation it affords, without possessing a single spark of honour or integrity, or at all considering that enticing persons into unnecessary litigation is a serious offence against morality — these persons would make most exorbitant charges, and frequently procure payment, because their clients would be

* See *antè*, p. 74.

† We understand that since the abuse complained of has been brought, in several flagrant instances, to the notice of the Benchers, greater precaution has been used. We hope the whole matter will be reformed. — *Ed.*

averse to the expense of bringing the matter before the proper tribunal. Conceding, therefore, the utility of taxation, I think there is cause to complain of the manner in which it is done. In the course of many actions, various attendances are made, writs issued, and other things done, which the professional man could not in justice to his client avoid, and which, very generally, are caused by the acts of the opposite party. These attendances, &c. are struck out by the officer on taxation of costs between party and party; and the attorney must resort to his client for the amount of them.

To give some examples:—An action is brought for a debt, and the defendant, his friend, or attorney—perhaps all three—wait upon the plaintiff's attorney, from time to time, with proposals of accommodation. The plaintiff is consulted on the subject; but for good and sufficient causes thinks, or perhaps his attorney may advise him, that they are not such offers as ought, under the circumstances, to be accepted. A negative is of course given; but why should the *plaintiff* have to pay these costs? Why are they struck out when, after judgment, the bill of costs is taxed? And yet such is the case; the rule being to the effect that no charges for attendances of this kind ought to be allowed, unless they bring about a compromise. Again: more than one writ in a term will not be allowed, unless there be an affidavit of due diligence having been used by the plaintiff's attorney; and, sometimes, not even then; nor is any thing allowed for endeavouring to serve a copy of a writ on a defendant, though hours, and even days, may be occupied in the attempt. If he be eventually served, the paltry sum of 5*s*. stands as a remuneration. Why should obstinate defendants be permitted to run a plaintiff to expense, and glory in having given a great deal of unnecessary trouble, by which their creditors have been delayed, and sometimes defeated, of their just rights? In services of subpœnas, too, the same observation as to difficulty of service and consequent remuneration applies.

With respect to witnesses, also, the scale of allowance by which the officers are guided in the taxation of a bill between party and party is too low. This should be amended, and adequate compensation always sanctioned. It is objected, that it is a public duty for men to attend to give evidence for the furtherance of justice; and therefore, strictly, no recompense ought to be given for loss of time, &c. This, and similar objections, may suit those who waste existence in dreams about the perfectibility of man's nature; but all who are conversant with the motives of human actions know how to appreciate their practical value. Virtue is its own reward; but such a reward few seek. It is quite obvious that men will not, except under circumstances of strong excitement, attend to give evidence without being paid for it. This being the case, why not adapt rules to the practice? I do not mean to contend that extravagant demands should be encouraged or yielded to; but that which is fair and reasonable ought not to be withholden, and the losing party ought to pay it.

These instances will, I think, sufficiently illustrate the introductory remarks, as they show that the party who gains an action may often sustain a loss, and, consequently, be in a worse situation than if he had relinquished what was due to him without an effort for its recovery. When the attorney informs his client, who has won his cause, that he has received the debt and costs from the opposite party, but that there still remains something due to him for extra costs, the client may perhaps be excused for entertaining a suspicion that the demand is unfair, and for thinking it strange as well as hard, that he should have to pay costs which the misconduct of his opponent has occasioned. Indeed, these are sometimes so heavy, and the suitor so ill able to bear them, that he might exclaim with Pyrrhus, King of Epirus, after his victory over the Romans,—"Another such a triumph, and I shall be undone."

Attorneys, on this account, get a bad name; or, at all events, the prejudices against them are strengthened. But the remedy is simple and easy. The officers in the respective Courts have only to exercise a little more liberality, and costs, charges, and expenses, would then fall on those who ought to bear the burden.

F. W. G.

SUPERIOR COURTS.

ROLLS COURT.

FRAUD.—SOLICITOR.

When a fraudulent conveyance is made in ignorance of a party's rights, it will be set aside; and the solicitor who takes a part in the transaction will be struck off the rolls.

This was a bill filed for the purpose of setting aside a conveyance of certain property in Yorkshire, which, it was alleged, had been obtained by the defendant through misrepresentation and fraud. The plaintiff, Catherine Shaw, was a young woman in low circumstances, of little or no education, and served as bar-maid in an inn at Manchester. Being entitled, under the will of her grandfather, to the property in question, and the defendant, her uncle, being about to bring an action of ejectment against the parties in possession, he represented to her that it would be of great advantage to the plaintiff if he had power to use her name, and full authority to act in her behalf. It appeared that he had also offered her a sum of 50*l*. to resign all her interest in the estate in his favour; and, eventually, in consideration of 100*l*., which, however, she never received, the plaintiff, without the assistance of any professional or friendly adviser, was induced to execute an instrument conveying the property to Mr. Clarke, his attorney, who afterwards conveyed it to the defendant himself. The plaintiff was at this time wholly ignorant of the extent of her rights, and had executed the instrument upon a representation by the defendant and his attorney alone. A verdict was obtained in the action of ejectment; and upon the title of the plaintiff the defendant was now in possession of the estate. After many unsuccessful applications to the defendant for the payment of the 100*l*., she received a letter from

Clarke, the defendant's solicitor, stating that the property had been recovered, and that her money was forthcoming, but urging her, in the mean time, to keep secret all matters connected with the proceedings, lest they might ultimately prejudice the cause. This suit was now instituted for the purpose of setting aside this conveyance in favour of her uncle, the defendant, which had, upon misrepresentation, been unduly obtained from her.

The *Master of the Rolls* said, that a right so obtained could not possibly be maintained by the defendant in that Court. The conveyance obtained must, therefore, be delivered up, the defendant accounting for all the rents and profits which had been, or which, without his wilful default or neglect, might have been, received. He should also observe, that a solicitor who was instrumental in a transaction of this kind, was not a person who, consistently with the interests of the public, could continue in that situation. He should read the briefs on both sides in the cause; and if it appeared that Mr. Clarke was implicated in the transaction to the extent to which he (the *Master of the Rolls*) had, perhaps mistakenly, concluded from what had passed, he should certainly feel it his duty to submit those briefs to the Lord Chancellor, who would exercise his judgment whether he would allow that solicitor's name to remain on the rolls of the Court.—*Shaw* v. *Shaw*. M. R. June 4. 1831.

On July 6. 1831, the *Master of the Rolls* stated, that he had looked through the briefs, and, although he continued dissatisfied with the conduct of the solicitor, yet, considering he had acted with inadvertence, he should return the briefs, not thinking himself called on to take any further steps in the case.

KING'S BENCH.

(*Before the Four Judges.*)

POOR LAW.—SETTLEMENT BY RENTING A TENEMENT.

Where a pauper went to reside in a house more than 10*l. a year value, a month on liking, for which time he was to pay no rent, and he resided there during that month and another month immediately continuously to the former, under an absolute agreement for a year: Holden, that under the* 59 G. 3. c. 50. *he gained a settlement.*

By order of two justices, Richard Wray and Winifred his wife were removed from the township of Weeton, in the East Riding of the county of York, to the township of Halsham, in the same Riding. The order was confirmed by the sessions, subject to the opinion of the Court on the following case:—"On the 1st of November, 1813, the pauper, being then legally settled in the appellants' parish, came to reside on a tenement in the parish of Sculcoates, of above the yearly value of 10*l*. Before he went to live at Weeton, he took the tenement in Bond Street, in Sculcoates. He entered upon it a fortnight after Michaelmas. The bargain with the owner of the tenement was, that the pauper should live a month in it for nothing, upon trial; that if upon that trial he liked it, he should take it at Michaelmas, at the yearly rent of 14*l*. The pauper resided upon it for a month upon trial, as above agreed; and then, according to the agreement above mentioned, took it at Michaelmas, at the yearly rent of 14*l*., and without any interruption in the residence, resided in it for the following month. He then quitted the parish altogether.

Archbold in support of the order of sessions. This case depends on the old law previous to the 59 G. 3. c. 50. It is only by implication that the settlement is gained under the 13 Car. 2. c. 12. § 1. That implication, however, only applies to persons who come to *settle*. The question, therefore, then arises, when did the pauper come to settle in the parish? Did he come to settle on his first coming into it, when he took the house on trial for a month? or on his second coming, when he took permanent possession under the agreement? Not on the former occasion, since, at that time, he only took the house on trial; nor on the latter, because at that time he was *in* the parish, and therefore it could not be contended that he *came* there to settle. The residence must be joined to an intention to reside permanently. If a person travelling were detained by sickness, and were during that detention to reside in a house, the rent of which was more than 10*l*. a year, he would not gain a settlement, because he had not come to reside in that house with an intention of settling.

The Court here stopped *Archbold*, and desired to hear

Blackburne and *Hildyard contrà*. The pauper evidently came to *Sculcoates* with the intention of settling; and the residing there forty days with the intention of remaining, was all that was necessary to gain a settlement. By the statute, a party is irremoveable as soon as he comes to live in the tenement, and he gains a settlement if he resides there forty days. In the present case, he comes into the tenement with the intention of stopping at least a month, on liking, with the contingency of remaining twelve months longer. He could not have been removed, as he had come there intending to remain on a tenement above 10*l*. a year value. Before 13 & 14 Car. 2. magistrates could not remove persons settling on any tenements. That statute was intended to apply to persons who came into a parish, purposing to remove as soon as they had consumed the stock, &c. in the neighbourhood. So it appears by the preamble. In the case of *Rex* v. *The Inhabitants of Hooe*, 4 East, 367. Lord *Ellenborough* said, that "where there is a tenement of sufficient value, and a tenant not removeable who is liable to all the burdens of a tenant, and has all the rights of one, and against whom, as such, every proceeding in law may be had, he gains a settlement by forty days' residence on such tenement." If, in the present instance, burglary had been committed in the tenement during the month the pauper occupied it on liking, it would have been correctly described as the dwelling-house of the pauper. Trespass might have been maintained by him against any wrongdoer.

The Court then intimated a wish to hear *Archbold* in continuation. A wrong conclusion has been drawn from the preamble of the 13 & 14 Car. 2. c. 12. The evil alluded to, in argument on the other side, is certainly recited: and the act proceeds to provide, that all *such* persons shall be removeable; but specifies another class who shall gain a settlement, and that class consists of persons coming to *settle*. That must mean persons coming to reside permanently. No doubt, if a person resides on a tenement during forty days, a presumption may thence be raised that he means to reside there permanently. That doctrine is supported by all the cases cited by his learned friends. The pauper undoubtedly intended to remain when he took the tenement, on the 23d of November, but not in October. Had he so intended at that time, he would have taken it, and not gone in upon trial. He did not determine so to do until the 23d of November; and until he did determine, it was not a coming to settle within the act. He never intended to reside a month on the tenement if he did not like it, nor was he bound to remain there. In the case of *Rex* v. *St. Michael in Coventry*, 15 East, 567., it was decided, that the expectation of a tenancy was not sufficient.

Lord *Tenterden* C. J. I am of opinion, that the pauper did gain a settlement in the parish of *Sculcoates*. It is clear that he resided there more than forty days. But it has been objected, that he did not come with an *intent* to settle. It certainly was not an absolute intent; but he came to try whether he liked the tenement. No case has decided that the original coming must be with an intention to reside, in order to gain a settlement within the 13 & 14 Car. 2. c. 12. And we are unwilling to put any new construction on that act, which may give rise to discussion.

Littledale J. I am of the same opinion. By the statute of 13 & 14 Car. 2. no time is mentioned, for which a party must come to remain. (*Gratwick* v. *Sheustone*, Burr. S. C. 474. 2 Bott. 141. *Rex* v. *Stanton under Bardon*, Burr. S. C. 558.) The question is this; did the pauper, come to settle? He did, for a month, and was then irremoveable; he continued to reside there forty days, and by that residence claimed a settlement.

Parke J. This case depends on the meaning of the words "coming to settle." Here the pauper resided for forty days, and during that time had an interest in the tenement. In my opinion, therefore, he gained a settlement.

Taunton J. My first impression was against this settlement: I was, however, misled by the words in the case, "upon trial." But they mean nothing more than an understanding between the landlord and himself, to see whether he liked it. While he was there, he was irremoveable. Under the statute of Charles, a tenant at will, or on sufferance, gains a settlement. It is not necessary that he should pay rent.

Order of sessions quashed. *Rex* v. *The Inhabitants of Halsham*. T. T. June 4. 1831.

POOR LAWS.—IRISH BASTARD.—59 G. 3. c. 12. § 33.

Where an Irishwoman had been delivered of an illegitimate child, and, within the age of nurture, it, as well as the mother, became chargeable, the Court refused to direct the removal of the child to Ireland, but directed that the mother should be removed thither under the 59 G. 3. c. 12. § 33.

A rule to show cause was obtained, why a *mandamus* should not issue, to be directed to the magistrates of the Worship Street Police Office, in the county of Middlesex, commanding them to make an order of removal of an Irishwoman and her illegitimate child, which was within the age of nurture, from the parish of St. Luke, to *Ireland*, under 59 G. 3. c. 12. § 33. The child had been born in the parish of St. Luke, and the mother was maintained in the workhouse of that parish. As the child was within the age of nurture, the magistrates refused to make the order, as it could not on that account be separated from its mother; and as it was settled where born, it ought not to be removed to *Ireland*, where it could not have the benefit of the poor laws. The magistrates,

Bennett and *Broughton*, showed cause, in person, against the rule. The 59 G. 3. c. 12. § 33. empowers two justices to remove natives of *Scotland* or *Ireland*, who have become chargeable, along with their children. But a bastard is in law *filius nullius*, and is in law, therefore, without father or mother. True it is, that a bastard may be removed from one part of England to another with the mother, for nurture, when within the age of nurture. But this does not apply to *Ireland*. For in that country there can be no nurture, since there is no provision made by law for the poor in that country. Now, supposing the mother should die in *Ireland*, as there are no poor laws, no order of maintenance could be made there. The mother, therefore, cannot be removed; for it is inconsistent with humanity that the mother should be separated from the child at that age. On the other hand, if the child should be allowed to remain here with its mother, the parish may obtain a warrant for the apprehension of the father, the mother being chargeable. A second ground for discharging the rule is, that this is a case upon which the magistrates have decided; and it was expressly determined, in the case of *Rex* v. *Justices of Middlesex*, 4 B. & A. 298., that although the ordinary practice of the Court was to grant a *mandamus* in order to compel magistrates to hear and determine a case, in which they have jurisdiction to hear, but which jurisdiction they have refused to exercise, the Court would not grant a *mandamus* to compel justices to pronounce any particular decision. It was holden, in the case of *Rex* v. *Whitehaven*, 5 B. & A. 790. and 1 D. & R. 384., that the fact of the unmarried daughter of an Irishman becoming chargeable, did not make the father and rest of his family removeable.

Lord *Tenterden* C. J. The statute in this case is imperative on the magistrates to remove, if the mother be chargeable.

Parke J. The magistrates have no discretion, but are bound to do what is prescribed by the act.

Bennett. The act is entirely silent with regard to illegitimate children.

Law and *Heaton, contrà.* This woman was actually chargeable to the parish of St. *Luke*, and the magistrates are bound, by the language of the act, to remove her. They cannot separate the child from the mother during the age of nurture, and therefore it must accompany her. *Rex* v. *Leeds*, 4 B. & A. 498.

Cur. adv. vult.

Lord *Tenterden* C. J. delivered judgment on the last day of term. After stating the question, his Lordship continued: "In the case of the removal of a child with its mother for nurture, when it is to be a removal from parish to parish in *England*, there can be no difficulty; because, in either parish, the child is entitled to support by the poor laws of England. But if the child in this case were to be removed to *Ireland*, there would be no person bound to support it, and for want of due care it might perish. Being born in this country, it is entitled to the benefit of the poor laws; and we conceive that the statute in question gives us no authority to direct the removal of the child. As to the mother, the words of the statute are so clear, that it is impossible to give effect to them without directing her removal. The words of the statute are, 'that it shall and may be lawful for two justices of the peace, and they are hereby required, upon the complaint of the churchwardens and overseers of the poor of any parish, that any person born in *Scotland* or in *Ireland*, or in either of the isles of *Man*, *Jersey*, and *Guernsey*, hath become chargeable to such parish, by himself or herself, or his or her family, to cause such person to be brought before them, and to examine such person and any other witness or witnesses, on oath, touching the place of the birth or legal settlement of every such person, and to enquire whether he or she, or any of his or her children, hath or have gained any settlement in that part of the united kingdom called *England*; and if it shall be found by such justices, that the person brought before them was born in *Scotland* or *Ireland*, or in either of the isles of *Man*, *Jersey*, and *Guernsey*, and hath not gained any settlement in *England*, and that he or she hath actually become chargeable to the complaining parish, by himself or herself, or his or her family, then such justices shall, and they are hereby empowered, by a pass under their hands and seals, in the form or to the effect prescribed by the act passed in the seventeenth year of the reign of his late Majesty King *George* II. to amend the laws relating to rogues and vagabonds (*statutis mutandis*), to cause such poor person, his wife, and such of his or her children so chargeable as shall not have gained a settlement in England, to be removed to the place of his or her birth, or last legal settlement, in the manner by the said act directed for the removal of rogues and vagabonds to *Scotland* and *Ireland*, and the isles of *Man*, *Jersey*, and *Guernsey*.' The rule, therefore, must be made absolute for the removal of the mother, and discharged for that of the child."

Rule absolute as to the mother; discharged as to the child.—*R.* v. *Bennett* and *Broughton*. June 9. 1831.

COURT OF COMMON PLEAS.

GAMING. — BILL OF EXCHANGE. — HORSE-RACE.

Where a bill of exchange accepted for the payment of a bet above 10*l. on a horse-race, rendered legal by the* 13 *Geo.* 2. *c.* 19., *was indorsed for a valuable consideration to a* bonâ fide *holder: Held, that the indorsee, though without knowledge of the original consideration, could not maintain an action on the bill.*

Assumpsit on a bill of exchange for 185*l.* The bill was drawn by T. M. Lee, in the year 1829, on the defendant, payable seven months after date. It was accepted by the defendant, and ultimately indorsed to the plaintiff. The cause was tried at the London sittings after last Michaelmas term, before *Tindal* C. J. It then appeared, that the defendant had accepted the bill for a bet to the amount of 185*l.*, lost by him on the St. Leger stakes at the Doncaster races in the year 1828. Those stakes are more than 50*l.* It was proved that the plaintiff had paid the full value of the bill, and without knowledge of the circumstances under which it was drawn and accepted. For the defendant it was objected, that as the bill had been accepted to pay a bet of more than 100*l.* on the event of a horse-race, it was void by the 16 Car. 2. c. 7. § 2. and § 3., even in the hands of a *bonâ fide* holder for a good consideration. On this ground a verdict was found for the defendant, with leave reserved for the plaintiff to move to set it aside and enter a verdict for 185*l.* A rule to that effect having been obtained,

Bompas Serjt. showed cause. The 13 Geo. 2. c. 19. and the 18 Geo. 2. c. 34. had, it was true, rendered horse-racing, under certain restrictions, legal. They had not, however, repealed the prohibition to betting to be found in the statute of Car. 2., and also in the 9 Anne, c. 14. The object of the statutes of George was merely to encourage the breed of horses, by permitting large prizes to be offered on races. But betting or gambling could not by any means further this object of the legislature. He cited "Bacon's Abridgment." [a] Under the title *Gaming* it was laid down thus; that it is "immaterial to consider whether the game itself be lawful or not; if a man loses 10*l.* by playing or betting at it, it is within the statute." He also cited *Clayton* v. *Jennings* [b], *Bowyer* v. *Brampton* [c], *Whaley* v. *Pajot*. [d]

Jones Serjt. *contrà*. He should contend, that the rule for setting aside the verdict found, and entering one for the plaintiff must be made absolute. By the statute of 16 Car. 2. c. 7. § 3. certain enactments were made relative to gaming of various descriptions. The games mentioned in the second section, and to which the third section referred, were "cards, dice, tables, tennis, bowles, kittles, shovel-board, cock-fighting, horse-racing, dog-matches, foot-races, or other pastimes, game or games whatsoever." The third section then proceeded: —

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[a] Page 345.
[b] 2 Black. 706.
[c] 2 Strange, 1155.
[d] 2 Bos. & Pul. 54.

That if any person or persons shall play at any of the said games, or any other pastime, game or games whatsoever (other than with or for ready money), or shall bet on the sides or hands of such as do or shall play thereat, and shall lose any sum or sums of money, other thing or things played for, exceeding the sum of 10*l.* at any one time or meeting, upon ticket, credit, or otherwise, and shall not pay down the same at the time when he or they shall lose the same, the party and parties who loseth or shall lose the said monies, or other thing or things so played for or to be played for, above the said sum of 10*l.*, shall not in that case be bound, or compelled or compellable, to pay or make good the same; but the contract and contracts for the same, and for every part thereof, and all and singular judgments, statutes, recognizances, mortgages, conveyances, assurances, bonds, bills, specialties, promises, covenants, agreements, and other acts, deeds, and securities whatsoever, which shall be obtained, made, given, acknowledged, or entered into for security or satisfaction of or for the same, or any part thereof, shall be utterly void and of none effect." Then came the 9 Ann. c. 14. § 1.; and that act, after reciting that "whereas the laws now in force for preventing the mischiefs which may happen by gaming have not been found sufficient for that purpose, for the further preventing of all excessive and deceitful gaming," it is enacted, "that all notes, bills, bonds, judgments, mortgages, or other securities or conveyances whatsoever, given, granted, drawn, or entered into, or executed by any person or persons whatsoever, where the whole or any part of the consideration of such conveyances or securities shall be for any money or other valuable thing whatsoever, won by gaming, or playing at cards, dice, tables, tennis, bowls, or other game or games whatsoever, or by betting on the sides or hands of such as do game at any of the games aforesaid, or for the reimbursing or repaying any money knowingly lent or advanced for such game or betting as aforesaid, or lent or advanced at the time and place of such play, to any person or persons so gaming or betting as aforesaid, or that shall during such play so play or bet, shall be utterly void, frustrate, and of none effect, to all intents and purposes whatsoever; any statute, law, or usage to the contrary thereof in anywise notwithstanding." By sect. 5. it was provided, "that if any person or persons whatsoever do or shall, by any fraud or shift, cozenage, circumvention, deceit, or unlawful device or ill practice whatsoever, in playing at or with cards, dice, or any other game aforesaid, or in or by bearing a share or part in the stakes, wagers, or adventures, or in or by betting on the sides or hands of such as do or shall play as aforesaid, win, obtain, or acquire to him or themselves, or to any other or others, any sum or sums of money, or other valuable thing or things whatsoever, or shall at any time or sitting win, of any one or more person or persons whatsoever, above the sum or value of 10*l.*, that then every person or persons so winning by such ill practice as aforesaid, or winning at any one time or sitting above the said sum of 10*l.*, and being convicted of any of the said offences, upon an indictment to be exhibited against him or them for that purpose, shall forfeit five times the value of the sum or sums of money, or other thing so won as aforesaid; and in case of such ill practice as aforesaid, shall be deemed infamous, and shall suffer such corporal punishment as in cases of wilful perjury." It was then enacted, by 13 G. 3, c. 19. § 5., "that no person or persons whatsoever shall start or run any match with or between any horse, mare, or gelding, for any sum of money, plate, prize, or other thing whatsoever, unless such match shall be started or run at Newmarket Heath, in the counties of Cambridge and Suffolk, or Black Hambleton, in the county of York, or the said sum of money, plate, prize, or other thing, be of the real and intrinsic value of 50*l.* or upwards; and in case any person or persons shall start or run any such match at any other place than Newmarket Heath or Black Hambleton aforesaid, or for any plate, prize, sum of money, or thing of less value than 50*l.*, every such person or persons shall forfeit and lose the sum of 200*l.* This act was followed by the 18 Geo. 2. c. 34., which extended and enforced its provisions.

Now, this bill might have been void, by the statutes of *Charles* and *Anne*; but the statutes of 13 Geo. 2. and 18 Geo. 2. had authorised horse-racing where the stake amounted to 50*l.* Here the stake did amount to 50*l.*; therefore the plaintiff ought to recover. A party might at common law have recovered the amount of a bet, which public policy and public morals did not forbid. This principle was clearly recognised in *Johnson* v. *Bunn*[a], and *Good* v. *Elliott*.[b] Feigned issues were express recognitions that a wager on a subject which was in itself innocent was lawful. Here the race on which the bet depended for its decision, was not only innocent, but recognised by statute. He then cited the cases of *Goodburn* v. *Marley*[c], *Clayton* v. *Jennings*[d], *Blaxton* v. *Pye*[e], *Lynall* v. *Longbottom*[f], *Brown* v. *Berkeley*[g], *Mc Allester* v. *Haden*.[h] He concluded by observing, that though the bill might be void as between the original parties to it, still it could not be so in the hands of a *bonâ fide* holder, unacquainted with the circumstances under which the bill was originally drawn and accepted.

Tindal C. J. This is an action on a bill of exchange drawn on *Theed*, and accepted by him in payment of a bet of 185*l.* on the *St. Leger* stakes They were a legal horse-race. The question then here is, whether, on the construction of the several acts of parliament on this subject, the indorsee can recover, he being a *bonâ fide holder for a valuable consideration, and without knowledge.* Now, 16 Car. 2. c. 7. declares horse-racing illegal. In sect. 13. it enacts, "That if any person or persons shall play at any of the said games, or any other pastime, game, or games whatsoever (other than with and for ready money), or shall bet on the sides or hands of such as do or shall play thereat, and shall lose any sum or sums of money,

[a] 4 Durn. & East, 1.
[b] 3 Durn. & East, 706.
[c] 2 Strange, 1159
[d] 2 Black. 706.
[e] 2 Wils. 309.
[f] 2 Wils. 36.
[g] Cowper, 282.
[h] 2 Camp. 438.

or any thing or things so played for, exceeding the sum of 100*l.* at any one time or meeting, upon ticket, or credit, or otherwise, and shall not pay down the same at the time when he or they shall so lose the same, the party and parties who loseth or shall lose the said monies or other thing or things so played or to be played of above the said sum of 100*l.*, shall not in that case be bound or compelled, or compellable, to pay or make good the same; but the contract and contracts for the same, and for every part thereof, and all and singular judgments, statutes, recognizances, mortgages, conveyances, assurances, bonds, bills, specialties, promises, covenants, agreements, and other acts, deeds, and securities whatsoever, which shall be obtained, made, given, acknowledged, or entered into for security or satisfaction of or for the same, or any part thereof, shall be utterly void and of none effect." This bill exceeds 100*l.*, and was given for a sum lost at a horse-race. If, therefore, there were no other provision of the legislature, it would be void under that statute. It is urged, however, that, by subsequent acts, horse-races, under certain restrictions, have been legalised; and, therefore, incidentally also bets upon such races. That, however, not only does not necessarily follow, but would be at variance with the intention of the legislature as expressed in those acts. The title of the 13 G. 2. c. 19. is, "An Act to restrain and prevent the excessive Increase of Horse-races; and for amending an Act made in the last Session of Parliament, intitled 'An Act for the more effectual preventing of excessive and deceitful Gaming.'" It then goes on to render certain races legal, if the sum of 50*l.* and upwards be run for, the object of the legislature being to promote improvement in the breed of horses, by affording an adequate object of competition. But that cannot have any thing to do with the practice of betting, which may be carried on by idle persons standing by, who have no interest whatever in the horses. The first section, which requires that the horses shall be entered to run in the name of the owner, shows, that it was not proposed to give others an interest in the race. Then comes the 18 Geo 2. c. 24. entitled, "An Act to explain, amend, and make more effectual the laws in being to prevent excessive and deceitful gaming, and to restrain and prevent the excessive increase of horse-races." The act then proceeds, that "nothing in this act contained shall extend, or be construed to extend, to repeal or invalidate an Act made in the ninth year of the reign of her late Majesty Queen *Anne*, intituled *An Act for the better preventing excessive and deceitful Gaming*." It also incorporates many of the provisions of 16 Car. 2. and which cannot be said to be repealed. Now, it has been decided that the statute of *Anne*, as well as that of *Charles*, applies to horse-races. The statute of *Anne* renders securities for all bets above the amount of 10*l.* illegal. This note, which was given for such a bet, must therefore be void. *Goodburn* v. *Marley* was decided soon after the 13 Geo. 2.; and yet it was not contended there, that a wager exceeding 10*l.* on a horse-race was legal. Although, therefore, a wager not exceeding 10*l.* might be legal, on a legal horse-race, yet a wager exceeding that sum on a horse-race, whether legal or illegal, is void; and, consequently, there is no ground for setting aside the verdict.*

Park J., *Gaselee* J., *Alderson* J., concurred.

Rule discharged. — *Shillitoe* v. *Theed*. E. T. April 23. 1831.

MINOR CORRESPONDENCE.

To the Editor of the Legal Observer.

SIR,

ALLOW me to return you my thanks for "The Legal Observer:" before it appeared, we were in want of a cheap and useful periodical to give us notice of the decisions in the Courts and the changes in the law made by the legislature, which your work not only does, but also lets us know every thing that is doing in the legal world; and I have had great pleasure in recommending it to my friends. As I believe it to be your wish, and anxious endeavour, that your work should give satisfaction to the profession, and as I have its success at heart, I make no apology for telling you that I believe no one likes the lists of bankrupts, insolvents, partnerships dissolved, and attorneys admitted, every one of which we see elsewhere, I therefore write to request you (as I am sure their insertion will be prejudicial to the work) to discontinue these uninteresting and useless particulars, and to supply their place with something else. I beg your acceptance of some papers enclosed, from which you may perhaps derive something interesting. Wishing the Legal Observer every success,

I am Sir,

Your most obedient Servant,

C. S.

Lincolnshire, July 6. 1831.

*** We find it rather difficult to please all our friends on the subject of the contents of the Monthly Record: some of them require the present Lists to be more fully given, and others call for new and additional Lists; whilst here is a correspondent (whom we have to thank in other respects for his communication) who is for discarding them altogether. Now that the arrears are disposed of, we expect to comprise the Lists in about one fourth part of each Number, and we shall strive to make the other three

* In addition to the cases above cited, may be mentioned *Henderson* v. *Benson*, 8 Price, 281. *Sigel* v. *Jebb*, 5 Stark. 1. In *Harrington*'s case, Lofft. 755. 4 Taunt. 683., the Court would not interfere to set aside a warrant of attorney, given to a *bonâ fide* obligee of a bond, though founded on a gaming transaction between the obligor and a third person. In an action by the indorsee, against the drawer of a bill accepted for a gaming debt, it was holden, that the acceptor was not liable, yet the drawer, who had received legal value from the holder, was liable on the bill; for the policy of the act in declaring the security to be void, was only in prevent it from being enforced against the loser, and the case of the drawer was not within the act. *Edwards* v. *Dick*, 4 B. & A. 412.

fourths as valuable and interesting as possible. After numerous applications to supply these very Lists, the Monthly Record was commenced; they are abridged as much as possible, and form a permanent record of intelligence more readily referred to than the Weekly Lists. If they are ineligible in a *legal* work, what is to become of the most popular *literary* periodicals, in which appear not only these Lists, but the Price of the Stocks and the Markets, &c. &c.? Surely our good friend of Lincolnshire wants a Legal Observer exclusively for himself. However, we are not obstinate, and if other subscribers make the same objections, we shall propose an alteration that we trust will be approved.

To the Editor of the Legal Observer.

SIR,

As the present time is an era for revising and amending the law in all its branches, the following point in bankruptcy has occurred to me:—

Bankruptcy—last Examination.

Would it be practicable for the last examination to supersede the necessity of a certificate, and thus prevent great trouble and *unnecessary expense*? A SUBSCRIBER.

ANSWERS TO QUERIES.

JUDGMENT SIGNED AFTER DEATH OF ONE JOINT DEFENDANT. P. 128.

THE judgment is clearly irregular, and cannot, therefore, be revived. The statute 8 & 9 Will. 3. c. 11. requires the death of a joint defendant to be suggested on the roll. This done, judgment may be signed, and execution issued, against the survivor. G. H. T. should, however, obtain leave to withdraw his judgment, if in the K. B., but if in C. P. he may do so as of course. C.

FALSE JUDGMENT. P. 32.

A case has been laid before counsel, and he inclines to the opinion that security is requisite; it being enacted, by the *sixth* section of the 19 Geo. 3. "that no cause shall be removed by *habeas corpus*, or otherwise, unless bail be given." But he does not consider it *clear* that bail is necessary; because the defendant might fairly argue that the words, "*habeas corpus*, or otherwise," refer to cases before judgment.

The statute 23 Geo. 2. c. 33., cited by your correspondent, does not apply, as the damages here were laid at 19*l.* 19*s.* 11*d.*, and the sheriff was empowered to hear the plaint by virtue of a writ of *justicies*. H. C.

APPOINTMENT. — LAND. P. 80.

There can be no doubt but that the married daughter can, under the late act, 11 G. 4. & 1 W. 4. c. 46., appoint exclusively to one child, and the unmarried daughter to one brother; but, inasmuch as the act does not go on to say (which it should) that a merely *nominal appointment* to the others should be *no longer* necessary, I apprehend a nominal portion of the land itself must be appointed to them.

A bequest of a shilling, I think, would not satisfy the statute, because the *subject matter* of the land is *power*. G. R. F.

QUERIES.

LANDLORD AND TENANT.

IF a landlord recover possession of his house under the statute of 52 Geo. 3., half a year's rent being in arrear, and the premises unoccupied, can such landlord afterwards proceed at law against the late tenant, and recover the amount of such rent? E. R. P.

LEASE. — DISTRESS.

A. having a lease of some premises underlet to two tenants, the upper part let to *B.* on lease, and the lower part to *C.*, on agreement to hold for a twelvemonth certain, and then to purchase the lease: *C.*'s year has expired, but he refuses to purchase the lease or to give up possession. If the original lessor distrain upon *C.* for the rent due for the *whole* premises, will he have any remedy over against either *A.* or *B.*?

INFANT. — CRIM. CON.

I shall be glad if some of your readers will inform me, whether an *infant*, aged 20, is liable to an action for crim. con. at the suit of the husband, and by a reference to any authority upon the subject. M.

ATTORNEY.

Can an attorney, who keeps out of the way to avoid service of the Master's *allocatur*, be eligible to remain any longer on the Roll? W. H. B.

MISCELLANEA.

CONSOLIDATED CODE, 1666.

April 25. 1666. I go to the office where Mr. Pryn came to meet about the Chest business; and till company come did discourse with me a good while in the garden about the laws of England, telling me the main faults in them; and among others, their obscurity through multitude of long statutes, which he is about to abstract out of all of a sort, and as he lives and parliaments come get them put into laws, and the other statutes repealed, and then it will be a short work to know the law.—*Pepys's Memoirs*, vol. ii. p. 388.

REASON FOR MAKING A JUSTICE OF THE PEACE.

May 1. 1666. At noon my cosen, Thomas Pepys, did come to me to consult about the business of his being a justice of the peace, which he is much against; and among other reasons tells me as a confidant, that he is not free to exercise punishment according to the act against Quakers and other people for religion. Nor do he understand Latin, so he is not capable of the place as formerly, now all warrants do run in Latin. Nor, he in Kent, though he be of Deptford parish, his house standing in Surrey. However, I did bring him to incline towards it if he be pressed to take it. *I do think it may be some repute to me to have my kinsman in commission there, specially if he behave himself to the content of the county.*—*Pepys's Memoirs*, vol. ii. p. 389.

The Legal Observer.

VOL. II. SATURDAY, JULY 30. 1831. No. XL.

> ——— "Quod magis ad nos
> Pertinet, et nescire malum est, agitamus."
> HORAT.

PRACTICAL DISSERTATIONS ON CONVEYANCING.

No. II.

ON THE RIGHT OF A CLERGYMAN TO CHARGE HIS BENEFICE.

THE exact power which a clergyman had by the common law to charge his benefice is not very clearly defined. It seems that he might have charged it during his own life and incumbency; and, with the consent of his patron and ordinary, might have effected a charge which would be binding on his successors. However, it is not necessary to ascertain this with any great precision, as his right to incumber his benefice is now regulated by certain statutes, and by the decisions of the Courts on them. Neither is it our present intention to treat of leases by clergymen,—a subject which has been sufficiently considered by many other writers, and on which it would be difficult to throw any new light. It is simply our present duty to enquire into the exact state of the law on a subject which has lately been much discussed both in and out of the Courts, viz. the right of a clergyman to charge his benefice by annuity or mortgage.

By the 13 Eliz. c. 20. it is enacted, that all chargings of a benefice with cure thereafter with any pension, or with any profit out of the same, to be yielded or taken, other than rents to be reserved upon leases, shall be utterly void. By the 14 Eliz. c. 11. s. 14. it is enacted, that all bonds, contracts, promises, and covenants for suffering or permitting any person to enjoy any benefice with cure, or to take the profits or fruit thereof, shall be to all intents and purposes of such force and validity as leases by the same persons made of such benefices, that is, to be void on the parson's non-residence. The 13 Eliz. c. 20. was continued by the 14 Eliz. c. 11. §§ 11. and 20., and the 33 Eliz. c. 9. §§ 8. and 27.; and by the 3 Car. 1. c. 4. it was, with all explanations and additions, made perpetual.

By the 43 Geo. 3. c. 84. § 10., the 13 Eliz. c. 20., and the 14 Eliz. c. 11., with all explanations and additions, were repealed; but the 43 Geo. 3. c. 84. has been since repealed by the 57 Geo. 3. c. 99. § 1., and the 13 Eliz. c. 20. and the 14 Eliz. c. 11. § 14. are therefore revived.*

Under the 43 Geo. 3. c. 84., it is clear that a clergyman could charge his benefice either by way of mortgage or annuity †; and all charges, therefore, made during the existence of that act down to the passing of the 57 Geo. 3. c. 99. are valid; and it has even been decided that a term of years in a benefice created in the interval between these two acts, for securing an annuity, may be assigned since the passing of the 57 Geo. 3. c. 99., although it operates substantially to change the securities from an annuity to a mortgage transaction.‡

Until very lately, however, some doubt existed whether a clergyman could not charge his benefice by deed with an annuity, since the revival of the 13 Eliz. c. 20. by the 57 Geo. 3. c. 99. However, the Court of King's Bench has solemnly decided, in the case of *Shaw* v. *Pritchard and others* §, that a demise by a parson of his benefice for securing an annuity, made subsequent to the 57 Geo. 3. c. 99., is void; and therefore it may now be considered as settled, that all charges, whether mortgages or annuities by deed or agreement, are invalid and ineffectual.

No sooner, however, was this point de-

* See *Shaw* v. *Pritchard and others*, 10 Barn. & C. 241.

† *Doe* d. *Cates* v. *Somerville*, 6 Barn. & C. 126. *Doe* d. *Broughton* v. *Stow*, 9 Barn. & C. 344. S. C. 4 M. & R. 269.

‡ *Doe* d. *Broughton* v. *Stow*, 9 Barn. & C. 344. S. C. 4 M. & R. 269.

§ 10 Barn. & C. 241.

cided, than the necessity for enabling a clergyman to effect a charge on his benefice suggested what was considered a mode of evading the effect of this decision. It has been the frequent practice, on securing an annuity, to give the annuitant a warrant of attorney as a collateral security. This collateral security, it was considered, might be made the principal; and the statute might thus be evaded. This question formerly occasioned much discussion, and has lately been revived, and we shall shortly state the principal authorities on the point.

The question first came directly before the Court in 1799, in the case of *Monys* v. *Leake and another* *, in which a rule was obtained, calling on the plaintiff to show cause why the defendant should not be discharged out of execution, and why a deed made for securing an annuity and charging the payment thereof upon benefices with cure of souls, and demising the benefices to a trustee for securing the payment of the annuity, with covenants by the defendant and his surety to pay the annuity and the warrant of attorney, and the judgment, entered thereon should not be vacated, and why the *fieri facias de bonis ecclesiasticis et capias ad satisfaciendum* should not be set aside. Lord Kenyon C. J. decided that the warrant of attorney was good. "Admitting," said he, "that every thing that was done by the defendant [the clergyman] to charge or to affect the livings directly is absolutely void, still the defendant's argument on this point is not true to its extent: it was said that in no case can the profits of a benefice be applicable to the payment of debts; but if that were so, what is to become of all the process *de bonis ecclesiasticis?* Now, in this case, one of the defendants executed a deed by which he granted an annuity or rent charge out of certain benefices: this is not *malum in se* — there is nothing wrong in such a transaction, except as far as it is prohibited by the statute; if, indeed, there had been any moral turpitude mixed in it, I would have followed it in all its consequences. But a deed that was intended to operate one way, may operate another way, *ut res magis valeat quam pereat*, if honesty requires it. Then why may not this deed, which was intended to operate as a rent charge upon the living, have effect as a personal security against the grantor, containing, as it does, a covenant to pay the annuity? A deed of feoffment may, if there be no living, operate as a covenant to stand seised to uses; and so in many instances. I will not, however, give any judicial opinion whether or not this deed be void by the statutes of Elizabeth, which certainly contains some strong expressions: the reason of making that act was, because in former times the patron sometimes presented a needy incumbent, who, being content to take the living on any terms, agreed to grant leases in favour of the patron himself. And I should object to anything being done obliquely that such a statute prohibited being done directly. *But in this case I cannot say that the letter of attorney was void.*"

It is proper to observe, in addition to this case, that although Lord Alvanley held, in the case of *Arbuckle* v. *Cowton* †, that the profits of an ecclesiastical benefice did not pass to the assignees of an insolvent clergyman, yet that the legislature has expressly enacted that the assignees of such an insolvent may apply for and obtain a sequestration of the profits of his benefice. ‡

There is no other decision on the point until recently; but the question has frequently arisen in practice, and it will be proper to state the opinions of several eminent conveyancers on the point. §

The late Mr. Walker gave an opinion in 1801, that although a charge would be void by the 13 Eliz. c. 20., a person who intended advancing his money in purchasing an annuity to be charged upon church preferment might, he thought, safely advance it upon a bond and judgment; and that if the grantor of the annuity made default in payment, the annuitant might sequester the living. However, Mr. Atherley adds, in a note to this opinion, "*Quære*, if it could be proved that the judgment was entered up with a view to enable the annuitant to come upon the living, the statute of Elizabeth being very strong." ‖

Mr. Preston also gave an opinion on the same point, which is dated on the 21st of May, 1821, in which he says, "The proposed security is to be given by way of charge on an ecclesiastical preferment. The statute of 13 Eliz. c. 20. was at one period repealed; the repealing statute is now repealed, so that the 13 Eliz. is in operation. For although a sequestration may, notwithstanding, be issued on a judgment obtained in action of debt &c., yet judgment confessed, with a preconcerted

* 8 T. R. 411.

† 5 Bos. & Pull. 321.

‡ 7 G. 4. c. 57. § 28., following the stat. 1 G. 4. c. 119. § 38.

§ These will be found at greater length in Blythewood's Conveyancing, vol. ii. p. 272. Stewart's edition.

‖ Atherley's MSS., vol. i. p. 106.

arrangement that a sequestration should be issued so as to charge the living, would, in my opinion, be deemed a charge within the meaning of the 13 Eliz.; in like manner as a judgment confessed for the purpose of having execution sued, and a term of years taken in execution, would be deemed an assignment in contravention of a condition in restraint of assignment.* So leases at annual rents less than the value, and given for the purpose of securing an annuity, would be deemed a charge within the meaning of the statute. Under this impression, I do not think the proposed security would be eligible to the intended purchaser of an annuity. In point of law, each sequestration takes priority according to the priority of the delivery to the sheriff of the execution, which is the foundation for the sequestration. These sequestrations are the mode of giving effect to executions against the chattels. They are not executions against a freehold estate, so as to operate by way of priority according to the date of the judgment."

This was the state of the authorities on the point until very recently; but it has lately engaged the attention of the Courts, and several cases have come before them.

The first of these, we believe, is the case of *Flight* v. *Salter;* the only report of which is in a short note by our own reporter †; in which the Court of King's Bench decided, that if a clergyman execute a warrant of attorney with the intention that his living should be sequestered, the proceedings under it will be void under the statute 13 Eliz. c. 20.: the circumstances of the case, however, are not fully given.

In the more recent case of *Gibbons* v. *Hooper,* the subject is more fully entered into. ‡

In this case it was held, that where warrants of attorney have been given by a clergyman to secure the payment of an annuity, but in them there was no mention made of the grantor's benefice, but the annuity deed expressly secured it on the benefice and the personal covenant of the defendant to the plaintiff: Holden, that the warrants were valid. The circumstances were as follow:—

Mr. *Follett* showed cause against a rule calling on the plaintiff to show why judgment on three warrants of attorney should not be set aside, on the ground that they were a charge upon the defendant's living, and, therefore, contrary to the provisions of the 13 Eliz. c. 20. Three annuities had been granted by the defendant to the plaintiff; and by the terms of the grant they were secured upon the defendant's living, and by the personal covenant of the defendant to the plaintiff: as an additional security, the defendant gave the three warrants of attorney in question. In the defeasance of those warrants, no mention was made of the benefice; but it was merely in the common form for securing the payment of an annuity. A sequestration for the amount of the annuity in arrear had issue. He should submit, that there was no ground for considering these warrants of attorney an infringement of the provisions of the statute of Eliz. Nothing appeared upon the face of them, to show that they were intended as a permanent charge upon the defendant's benefice. The security being given by a clergyman in case of non-payment of the sum secured, on judgment being entered up, a sequestration would of course issue against the living of the defendant. There was nothing to distinguish this case from the ordinary one of a clergyman giving a warrant of attorney as a security for a debt which he had already contracted.

Mr. *W. Campbell* and Mr. *Jardine, contrà,* submitted, that as it appeared the annuity was to be paid out of the proceeds of the benefice, and the warrant of attorney was given ot secure that payment, although no mention was made of the benefice in the defeasance of it, the warrant of attorney must be considered as a security for a charge on the grantor's living. The intention must be inferred, that the living should remain as a security for the payment of the annuity This was, therefore, a charge on the benefice. There were here two securities granted with a common purpose, and at the same time. They were, therefore, the same security.

Lord *Tenterden* C. J. One security might be bad, while the other might be good.

Mr. *Jardine.* He should submit, that this was like the case of a bond given for the payment of money on an illegal contract. The one being void, they were both void. Thus, a bond given as a security for the payment of money on the sale of an office, which sale was void by the statute of the 5 & 6 of Ed. 6. c. 16. § 3.

* The case of *Doe* d. *Mitchinson* v. *Carter,* 8 T. R. 57., is here alluded to; which decided, that when a lessor gives a warrant of attorney to confess judgment for the *express purpose* of enabling such creditor to take the lease in execution under the judgment, it is in fraud of a condition against assignment, although a *bonâ fide* execution is not a breach of such a condition.

† *Anst.* vol. i. p. 331. H. T. 1831.

‡ T. T. June 11. 1831.

was void. That was to be found decided in the case of *Lee* v. *Colshill*, Cro. Eliz. 529.; which case was also to be found, under the name of *Smyth* v. *Colshill*, Anderson, 55. He also cited the case of *Flight* v. *Salter*.

Lord *Tenterden* C. J. It is said that these warrants of attorney were given for the purpose of making the living subject to the payment of this annuity. But there is nothing in the defeasance of the warrants to make one suppose that this case is different from the common case of a clergyman giving security for the payment of a debt, which he had already contracted. The rule, therefore, must be discharged.

Littledale J. concurred.

Parke J. The warrant of attorney is nothing more than a power granted to the plaintiff to have a more speedy execution. I do not see that there is any difference between the creditor of an annuity and any other creditor, except that he has a more speedy mode of proceeding.

Taunton J. concurred.—Rule discharged.

It seems, therefore, that a warrant of attorney may be so drawn, as to enable a clergyman to grant an effectual charge on his benefice; and it is clear that it is not necessary to mention the collateral security in the warrant of attorney. When a warrant of attorney is given by a clergyman to secure an annuity, the defeasance was frequently made to authorise the levying of the whole sum for which the judgment is confessed, and, after payment of the arrears, to invest the residue in the stocks, in trust to secure the future payments, subject nevertheless to the grantor's right of repurchasing the annuity, and consequently, in that event, of a transfer of the stock to him. It seems very doubtful, however, whether such a warrant of attorney would not be considered as a permanent charge on the benefice. It seems safer, therefore, to make it merely secure the arrears.

It also seems clear that a clergyman can secure an annuity by his bond and personal covenant to pay it, as the annuitant may sue on either in case of the annuity being in arrear: if he bring his action on the bond, he may get an execution for the debt and damages; if he bring his action on the covenant, he may get an execution for his damages and costs; and in either of these cases, a *fieri*, *levari*, or *sequestrari facias de bonis ecclesiasticis* may be issued, to make or levy the sum recovered of the ecclesiastical goods of the defendant.* It does not appear to be settled whether the plaintiff can, after the sum indorsed on the writ is levied, preserve his priority, with regard to the future arrears of an annuity, over another judgment creditor who has delivered another writ to the bishop in the interval after the sum indorsed on the former writ is levied, and before the time of the next periodical payment arrives. The equitable interference of the Court seems hitherto to have extended no farther, in cases of judgments entered on bonds to secure annuities, than to permit the judgment to stand as a security for the future payments, and fresh executions to be taken out as those payments became due. †

* Tidd's Prac. 1008. 1039. 7th edit. 2 Bac. Abr. 560.

NEW BILLS IN PARLIAMENT.

CHURCH REFORM.

ANALYSIS OF LORD DACRE'S BILL,

Intituled "An Act for the Commutation of Tithes in England and Wales." ‡

The preamble recites, that the payment of tithes in kind, and of temporary compositions for the same, has been found to be productive of injurious consequences to agriculture, as well as to the moral influence of the clergy, and to their situation with respect to the persons by whom tithes are payable; and it is expedient to provide for the permanent commutation of tithes throughout England and Wales, in consideration of such payments as are hereinafter mentioned: It is therefore proposed to be enacted, That every commutation which shall be made in the manner hereinafter authorised and directed, in respect of such tithes and other payments as are hereinafter mentioned, shall from time to time, and at all times for ever, from and after the making thereof, be valid and effectual, to all intents and purposes whatsoever.

Power to owners of two thirds in value of land to apply to Court of Quarter Sessions for appointment of commissioners.

The bill contains directions as to signing memorial to the Sessions, and prescribes the notices to be affixed on the church door, and in the country newspaper, or in the Gazette.

Power for majority of owners of tithes to deliver in a nomination of commissioner.

The facts of signature and notice to be proved on presentation of memorial.

The clerk of the peace to issue commission, pursuant to order of Court.

The form of oath of commissioners is then prescribed.

Provisions for appointment of new commissioners, on death or resignation.

† *Howell* v. *Hanforth*, 2 Wm. Bla. 1016. *Murray* v. *Harding*, Ib. 866. *Ogilvie* v. *Foley*; Ib. 1111. *Scott* v. *Whalley*, 1 H. B. 297. *Rex* v. *Bishop of London*, 1 Dow. & Ry. 486. And see *Cuddington* v. *Wilky*, 2 Swans. 174. *White* v. *Peterborough*, 4 Swans. 109.

‡ We have abridged the bill as much as possible, except in a few of the principal and most important clauses.

The owners of lands and owners of tithes may eventually agree to appoint a sole commissioner.

Provisions are then made for the appointment of an umpire, in case of difference of opinion.

And the oath of the umpire is also set forth.

The appointment of a clerk and surveyor is then authorised, with reasonable allowances.

Maps and surveys to be made.

Existing surveys may be used, and the opinion of counsel taken.

Power to enter lands, without being subject to an action.

Notice to be given of meetings for the execution of the act.

Notices to be affixed on the church door; and where there is no church or chapel in the parish, the notice to be affixed on the church door of adjoining parish.

Power to the commissioners to require statements in writing from the owners of tithes, and to call witnesses, and to examine upon oath.

The commissioners are required, from the London Gazette, or by such other means as they think proper, to ascertain the average price of a bushel of good marketable wheat within the county in which the parish named in such commission shall be situate, during the term of three years up to the 29th of September preceding the date of the commission; and according to such average to make a just valuation of all the lands and tenements within the parish subject to the payment of tithes in kind, and to ascertain what annual rent, according to such average, will be equal to the yearly value of one fifth part of all the arable or tillage lands, one tenth part of all the wood lands, and one eighth part of all the other lands within the parish, which are subject or liable to the payment of tithes in kind; and in making such valuation, the situation and naturally productive quality of such arable lands, under a proper course of husbandry, and according to the custom of the country, shall be duly considered by the commissioners; and the commissioners shall also determine what yearly sums are equivalent to the tithes of each proprietor's lands and tenements within the parish, which yearly sums shall be charged upon the lands and tenements of the respective proprietors, as yearly rents payable thereout respectively to the owner or owners of tithes, in lieu of the tithes thereof, and the same rents shall be charged on the several lands and tenements of the said several proprietors accordingly; and the commissioners shall also calculate, ascertain, and set forth the number of bushels and decimal parts of a bushel of good marketable wheat required, according to such average price, to produce each of the several yearly rents or sums so to be charged upon the lands and tenements; and the same yearly rents shall be payable by the respective occupiers of such lands to the owner or owners for the time being of the tithes, by four equal quarterly payments in every year, for ever.

The bill then sets forth the remedies for the recovery of the arrears of corn rents in lieu of tithes, by distress and action.

As between landlord and tenant, the tenant to pay corn rent in lieu of tithes, where there is no stipulation to the contrary, but subject to be varied by contract.

The tithe to be divided between the persons entitled.

Where there are disputes on exemption from tithes, the lands in dispute to be assessed separately.

But the commissioners not to have power to decide the title to tithes.

An award to be made in writing by the commissioners, expressing the quantities, average, yearly sums, &c.

The award to be read and executed at a special general meeting, after ten days' notice; and then be enrolled with the clerk of the peace, or at Westminster.

The award to be deposited in the church chest.

The award not to be invalidated after execution and enrolment.

Exchange for tithes may be made in land, by agreement amongst the owners of tithes and land; such allotments to be specified in the award.

Sealing by bodies politic, corporate, or collegiate, to be deemed equivalent to signing.

That from the 29th of September before or after the execution of the award, as the said commissioners shall direct, the several yearly rents or sums in lieu of tithes shall commence; and all tithes, both great and small, and all payments in lieu of tithes, shall cease: but Easter offerings, mortuaries, and surplice fees, shall not be included in such commutation.

Tithes, &c. accrued due before the commencement of the commutation not to be affected.

That after the expiration of three years from the award, the owner of the tithe rents, or the majority in value, to apply to any Court of Quarter Sessions of the Peace (after notice), to nominate three arbitrators for ascertaining the average price of a bushel of good marketable wheat within the said county, for the term of three years then last past; and the justices shall, by order of the same Court, upon proof of such notice having been given, appoint three fit and disinterested persons to be arbitrators for the purposes aforesaid; and, if the occasion shall appear to the said justices to require it, to appoint any other such person or persons to the same office, on the death, resignation, or refusal to act of any person or persons first nominated, until the purpose of such arbitration shall be wholly completed; and the arbitrators, or any two of them, are hereby authorised and required, from the London Gazette, or by such other means as they shall think proper, to ascertain the average price of a bushel of good marketable wheat within the county in which such parish shall be situate, during the said term of three years then last past; and the said arbitrators, or any two of them, shall, by their report in writing under their hands, to be delivered to the next Court of Quarter Sessions, set forth such average price; and in case such average price shall be found more or less by the value of 3*d.* per bushel than the price first ascertained and to be set forth in the award of the said commissioners, or than the average price then last ascertained, as the case may be, the yearly rents or sums then charged upon each proprietor's estate in lieu of tithes shall be varied, and increased

or diminished, in proportion to the amount which the average price so found by them the said arbitrators shall bear to the price to be ascertained and set forth in such award of the commissioners, or to the average price then last ascertained, as the case may be; and the said arbitrators, or any two of them, shall by their said report set forth the exact amount to which each of such yearly rents or sums shall be increased or diminished as aforesaid; which said report shall, by order of the said Court, be confirmed, varied, or altered, as to the said justices shall seem just; and the said several yearly rents or sums, so varied and ascertained, shall remain payable for the term of three years then next ensuing, and until the same yearly rents or sums shall afterwards, upon a like application, be again varied and re-ascertained; and such future applications the said owner or owners of tithes, and owners of lands and tenements, are hereby respectively authorised to make, from time to time, and at any time after the expiration of every term of three years, for ever, in such or the like manner and form as herein-before are mentioned and directed with respect to the said first application; but the costs, charges, and expenses of every such application to the Court of Quarter Sessions, and of varying and re-ascertaining such several yearly rents or sums as aforesaid, shall be paid and defrayed by the person or persons who shall give notice of such application respectively.

Provision is then made for apportioning such rents, in case of a division of the lands by sale or otherwise.

The rights to tithes of barren land, in respect whereof no assessment shall have been made, not to be affected.

The Statutes of Limitation applicable to tithes to apply to assessments under this act.

Persons holding different characters may act separately in each.

Parties may sell, mortgage, &c. tithes, before execution of award.

Leases, wills, and settlements of tithes, not to be affected.

Provision for paying the expenses attending the commutation.

Money advanced for executing this act to be repaid, with interest.

An auditor of commissioners' accounts to be chosen by the majority of the owners.

The receipt of tithe rents to be equal evidence of title to the receipt of tithes.

Tithe rents to be subject to the same rates and taxes as the tithes.

The act not to be impeded by deaths or resignation of parties.

This act not to extend to any payments in lieu of tithes within the city of London; nor for any permanent rent charge, or other rents in lieu of tithes, calculated according to any rate or proportion in the pound on the rent or value of any houses or lands in any city or town, under any custom or private act of parliament; nor to any lands or tenements included in any modus or composition real; nor to the tithes of mills or fish, where the same may be payable; nor to any lands or tenements, the tithes whereof shall have been already perpetually commuted or extinguished for a rent fixed by the price of corn, or other perpetual money rent, under any act of parliament heretofore made or passed.

ANALYSIS OF LORD KING'S BILL,

Intituled "An Act to prevent Pluralities in the Church, in all Cases where the annual Value arising from the different Benefices shall collectively exceed a certain Sum."

The bill recites, that the non-residence of the clergy on their respective benefices is contrary to the original compact and purpose for which tithes were granted, and injurious to the true interest of the Church.

And that the abuse of pluralities, when two or more rich benefices are held by the same incumbent, is the cause of great scandal both in England and in Ireland; and the practice of holding several benefices is indefensible, except where the annual income from benefices separately is too small for the decent maintenance of the clergy.

It is therefore proposed to be enacted, That no two or more benefices, livings, donatives, perpetual curacies, or other preferment in the Church, having cure of souls, within any diocese of England or Ireland, shall be held by the same incumbent, the aggregate value whereof shall exceed the sum of *five hundred pounds*, unless he shall have been in actual possession of all such preferment before the passing of this act.

That if by any contrivance, misrepresentation, or other contravention of the true intent and meaning of this act, any spiritual person shall hold any two or more benefices in plurality, the annual aggregate value of which shall exceed the sum of *five hundred pounds*, he shall have no power to enforce by law the payment of any tithes, rents, dues, or emoluments, over and above that sum; and on proof being given that the said sum of 500*l.* of lawful money shall have been tendered to the incumbent of such livings by the occupiers of land, or by any person on their behalf, the same shall be an effectual bar to any action or further proceeding at law or otherwise.

REVIEW.

Advice to Trustees, and to those who appoint to that Office: including Trusts and Trusteeships; Choice and Appointment; Acceptance and Duties; Powers and Disabilities; Liabilities and Removal; Dangers and Release; Indemnity and Protection; Suits and Costs. By Harding Grant, Author of "Chancery Practice." London: A. Maxwell. 1830.

THIS appears to be a useful book for unprofessional readers who may be called upon either to choose or act as trustees. We have heard it said, by no mean authority, that he who undertakes the office of a trustee commits an act of folly. The remark may be a just, but it is a selfish one. We know, indeed, that trustees are exposed to the complaints and censures of

those for whom they act, if they do not substitute their wishes in place of their own judgment and sense of duty; and if they yield to their importunities, they are too frequently involved in the agreeable occupation attendant upon a suit in Chancery —to say nothing of its expense. Still the affairs of life cannot be conducted — the interests of helpless women and infant children cannot be protected,—unless men can be found to engage in the honourable though burthensome task of trusteeship. It should, however, be encountered only by men who unite firmness with judgment, and who will be guided strictly by the powers conferred upon them.

The subject chosen by the compiler of the work before us is thus manifestly of the first importance. We cannot say that he has thrown any new light upon it; but he will probably be best satisfied by our permitting him to explain his own views and objects, and the utility or necessity of the publication. We therefore subjoin the following extracts from the preface:—

"So far as the author has met with any book of this kind extant, there appears to him to be quite room for the present undertaking. The works of Mr. Willis and Sir George Hampson have each their appropriate and well known respectability. But it is no disrespect to those gentlemen to say, that their works (to which, however, the author acknowledges his obligations) do not answer the specific purposes of this. They are not by any means adapted, *peculiarly*, to the use of, and therefore of little comparative service to, *unprofessional* readers. Yet this does not derogate from the esteem in which they may be held by the *profession*, not only from the weight of the names of their respective and respectable authors; but as being, on that ground, what is technically meant by books of *authority* for *professional* purposes more exclusively. There are, however, *other* occasions on which the *unprofessional* public need advice or guidance. The present attempt, therefore, is not anticipated by the respectable works before mentioned, or either of them.

"He has forborne going into the abstruse *learning* of trusts, in the way of tracing their legal or equitable origin, or otherwise; all which he deemed foreign to his immediate purpose, which was to be *practically* useful. And for the same reasons he has avoided entering into some other *remoter* points of legal nicety of *rare* occurrence, or perhaps more speculative than practical, and respecting which, should they arise, they must necessarily be subjects, *pro re natâ*, of professional, and, probably, of *counsel's* directions. The more *every-day* and *prominent* subjects of information, therefore, and such as may reasonably be supposed to come within a trustee's personal cognizance and judgment, and on which he must personally *act* in his *unprofessional* character, and of which it behoves him to be aware, are what have, in these pages, been kept chiefly in view."

THE LORD CHANCELLOR'S BANKRUPTCY COURT BILL.

Further Amendments and new Clauses.

We published, in the Monthly Record for February, a full copy of the Bankruptcy Court Bill as originally brought into the House of Lords; and in No. XX. of the Legal Observer (vol. i. p. 305.) we inserted all the new clauses which had been introduced in the committee. We now present to our readers the further amendments, in the Bill just brought in by the Lord Chancellor: thus showing the state of the proposed measure at the present time.

The bill is much improved in its form, the several parts are better arranged, and the details more clearly stated.

The following is the new clause, enabling attorneys and solicitors to practise in the new Court, except the Court of Review and the trial of issues by jury, without being obliged to employ counsel. This will be a saving of expense to the suitors, and satisfactory to the profession.

And be it enacted, That all attorneys and solicitors of any of the superior Courts of law or equity at Westminster may be admitted and have their names enrolled in the said Court of Bankruptcy, without any fee or charge other than such as shall be allowed by this act, or any rule or regulation to be made in pursuance thereof, and may appear and plead in any proceedings in the said Court without being required to employ counsel (except in proceedings before the said Court of Review, and upon the trial of issues by jury); and in case any person, not being an attorney or solicitor duly admitted as aforesaid, shall practise in the said Court of Bankruptcy as an attorney or solicitor, he shall be deemed guilty of a contempt of the said court, and be liable to all the penalties incident thereto, on complaint thereof made to the Court of Review; and that all the laws and statutes now in force concerning attorneys and solicitors shall extend to attorneys and solicitors practising in the said Court of Bankruptcy.

There are also some important alterations relating to *official assignees*, which we have distinguished by Italics. It will be observed that the proviso which is added to the clause leaves the appointment and removal of solicitors and attorneys, and the time and manner of effecting sales on property, in the power of the assignees chosen by the creditors. We give the clauses entire, as they contain also some verbal amendments.

And be it enacted, That a number of persons not exceeding thirty, being merchants, brokers, or accountants, or persons who are or have been engaged in trade in the cities of London or Westminster or the parts adjacent, shall be chosen by the Lord Chancellor to act as official assignees in all bankruptcies prosecuted in the said Court of Bankruptcy; one

of which said official assignees shall in all cases be an assignee of each bankrupt's estate and effects, together with the assignee or assignees to be chosen by the creditors; *such official assignee to give such security*, to be subject to such rules, selected for such estate, and act in such manner as the said chief and other Judges, with the consent of the Lord Chancellor, shall from time to time direct; and all the personal estate and effects, and the rents and profits of the real estate, and the proceeds of sale of all the estate and effects, real and personal, of the bankrupt shall in every case be possessed and received by such official assignee alone, *save where it shall be otherwise directed by the said Court of Bankruptcy or any Judge or commissioner thereof;* and all stock in the public funds or of any public company, and all monies, exchequer bills, India bonds, or other public securities, and all bills, notes, and other negotiable instruments, shall be forthwith transferred, delivered, and paid by such official assignee into the Bank of England, to the credit of the Accountant General of the High Court of Chancery, to be subject to such order, rule, and regulation, for the keeping of the account of the said monies and other effects, and for the payment and delivery in, investment, and payment and delivery out of the same, as the Lord Chancellor, or the said Court of Review, or any Judge of the said Court of Bankruptcy, if authorised so to do by any general order of the same Court, shall direct; and *if any such assignee shall neglect to make such transfer, delivery, or payment, every such assignee shall be liable to be charged in the same manner as by the said recited act is provided in cases of neglect by assignees to invest money in the purchase of exchequer bills, when directed so to do.*

Provided always, and be it enacted, *That nothing herein contained shall extend to authorise any such official assignee to interfere with the assignees chosen by the creditors, in the appointment or removal of a solicitor or attorney, or in directing the time and manner of effecting any sale of the bankrupt's estates or effects.*

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FOR THE COMPOSITION OF TITHES.

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IN your Number of July 9 you give an analysis of the Archbishop of Canterbury's bill for facilitating Composition for Tithes. The first enactment appears to be, "that power be given to the *incumbent* and the *owners of two thirds in value* of the lands subject to tithes, to make a binding agreement for a composition, &c. &c." The fourth runs thus: "The archbishop or bishop of the diocese and the patron to consent." The 8th, — "All the signatures to the agreement to be affixed within six months after the date of the agreement." The 16th, — "Every agreement, *unless vacated* under the preceding clauses, to be valid, *although not signed by a due proportion of owners*, &c., provided it has been signed by the incumbent, and by the archbishop or bishop, and by the patron, and a notice has been given." Now, Sir, I do not, with my notions of common sense, at all understand this sort of legislation; it seems to me to be a complete piece of contradiction; and methinks parties interested under it (if it pass) will not be long in finding it out. *Imprimis.* — To make a *binding* agreement, there must be the incumbent on one part, and the *owners of two thirds*, &c. on the other part. This is all fair enough, no doubt. The parties to the agreement are here confined *to two;* but the next enactment I have noticed requires that the archbishop or bishop, and patrons, shall consent; thus introducing *two more* parties. Then, to render the agreement valid, the signatures must be affixed within six months. Quite correct, I dare say. Then comes the clause in question. In the first place, if not signed by a due proportion of owners, IT IS *vacated* under the first clause, and likewise under the 8th. And then "*unless vacated* under the preceding clauses, to be valid, although not signed by a due proportion of owners," &c. &c. What? when it enacts in the first place that it requires two thirds of the owners to make the agreement valid; then goes on to state that the agreement will be valid without them. I trust the bill brought into the Upper House is not in this state; if it really be so, it is either gross ignorance or negligence, or else the first clause is a blind. For people looking cursorily at the act will naturally read the first clause; and finding that an agreement requires the consent of two thirds of the owners, will be satisfied. And they will never imagine that the subsequent part of the act quietly supersedes the owner's right, and says, I can do without you.

The bill being now in progress, I deem it right to call your attention to the matter.

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Provided always, That every such agreement as aforesaid shall, unless the same shall be vacated by the said Court upon an application, to be made as aforesaid, be valid and effectual to all intents and purposes, although the same shall not have been signed by the owners of two third parts in value of such farms, lands, and tenements as aforesaid, or the signatures to such agreement shall not have been affixed thereto within the space of six calendar months before the time of having given such notice as aforesaid, or the several parts of the agreement shall not have been deposited in the manner required by this act: provided always, that this clause shall not give validity to any agreement where the same shall not have been duly signed by the rector, vicar, or other incumbent of the benefice or living, and by the archbishop or bishop within whose diocese the benefice or living shall be situate, and by the patron or patrons of the benefice or living, or where a notice of the agreement, and of the name or names of the commissioner or commissioners, shall not have been given in the manner required by this act.

And be it further enacted, That after the deposit of the several parts of the said award as herein-before is directed, the commissioner or commissioners shall obtain from a barrister at law of five years' standing, to be appointed for the purpose by the archbishop or bishop of the diocese (which appointment such archbishop or bishop is hereby directed to make, upon the application of such commissioner or commissioners), a certificate in writing under his hand that full and sufficient evidence has been adduced to him that the provisions herein-before contained with respect to the agreement for the composition being signed by the rector, vicar, or other incumbent of the benefice or living, and by the archbishop or bishop, and patron or patrons respectively, and with respect to the notice to be given of such agreement, and with respect to the deposit of a draft of the award, have been duly complied with, and that the award has been duly executed, and published and deposited as is required by this act; and every barrister so to be appointed shall have power to examine any person or persons on oath in relation to the premises; and the commissioner or commissioners shall cause such certificate to be annexed to that part of the award which shall have been deposited in the registry of the diocese; and until such certificate shall have been so obtained and annexed, no part of the costs, charges, and expenses of the commissioner or commissioners shall be allowed under the provision herein-after in that behalf contained.

And be it further enacted, that in any case in which any such certificate as aforesaid shall have been made and annexed as aforesaid, the award to which the same shall relate shall to all intents and purposes be a valid award for the purposes of this act, notwithstanding any informality or irregularity may in fact have occurred in any of the proceedings or things directed by this act to be had or done prior to or upon the execution thereof, yet so that this present clause shall not give effect to any such award where the same shall not be duly signed by the commissioner or commissioners, or where the agreement in pursuance of which the same shall be made shall be vacated under an order of the said Court of Exchequer, pursuant to the provisions herein-before in that behalf contained.

NOTES OF THE WEEK.

BANKRUPTCY REFORM.

It is now strongly rumoured that the Bankruptcy Bill will not be pressed in the present session.

NEW PEERS.

We have seen a list of twenty new peers who are to be created immediately.

LEGAL SINECURES.

The lucrative place of Clerk of the Errors in the King's Bench is just vacant by the death of Mr. Smith. We earnestly suggest to the Government that this is the proper time to show that they have the cause of law reform truly at heart by abolishing this sinecure.

SUPERIOR COURTS.

LORD CHANCELLOR'S COURT.

If a counsel assigned by the Court to a pauper chooses to withdraw from the suit, and other counsel undertake it, this circumstance is not necessarily a ground for obliging the pauper to give security for the costs.

Sir *Edward Sugden* moved that the plaintiff, who sued *in formâ pauperis*, should give security for the costs of an appeal. He first took an objection to the form of the appeal. Mr. *Girdlestone* had been assigned as counsel for the plaintiff in the cause, on her application upon the usual allegation that she was a pauper. Her bill was dismissed at the hearing; and, being dissatisfied with that decision, she determined to appeal; but Mr. *Girdlestone*, not being of opinion that there were grounds for the appeal, had declined to sign her petition. She thereupon applied to other counsel, and Mr. *Knight* and Mr. *Spurrier* signed the petition now before

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Provided always, That every such agreement as aforesaid shall, unless the same shall be vacated by the said Court upon an application, to be made as aforesaid, be valid and effectual to all intents and purposes, although the same shall not have been signed by the owners of two third parts in value of such farms, lands, and tenements as aforesaid, or the signatures to such agreement shall not have been affixed thereto within the space of six calendar months before the time of having given such notice as aforesaid, or the several parts of the agreement shall not have been deposited in the manner required by this act: provided always, that this clause shall not give validity to any agreement where the same shall not have been duly signed by the rector, vicar, or other incumbent of the benefice or living, and by the archbishop or bishop within whose diocese the benefice or living shall be situate, and by the patron or patrons of the benefice or living, or where a notice of the agreement, and of the name or names of the commissioner or commissioners, shall not have been given in the manner required by this act.

And be it further enacted, That after the deposit of the several parts of the said award as herein-before is directed, the commissioner or commissioners shall obtain from a barrister at law of five years' standing, to be appointed for the purpose by the archbishop or bishop of the diocese (which appointment such archbishop or bishop is hereby directed to make, upon the application of such commissioner or commissioners), a certificate in writing under his hand that full and sufficient evidence has been adduced to him that the provisions herein-before contained with respect to the agreement for the composition being signed by the rector, vicar, or other incumbent of the benefice or living, and by the archbishop or bishop, and patron or patrons respectively, and with respect to the notice to be given of such agreement, and with respect to the deposit of a draft of the award, have been duly complied with, and that the award has been duly executed, and published and deposited as is required by this act; and every barrister so to be appointed shall have power to examine any person or persons on oath in relation to the premises; and the commissioner or commissioners shall cause such certificate to be annexed to that part of the award which shall have been deposited in the registry of the diocese; and until such certificate shall have been so obtained and annexed, no part of the costs, charges, and expenses of the commissioner or commissioners shall be allowed under the provision herein-after in that behalf contained.

And be it further enacted, that in any case in which any such certificate as aforesaid shall have been made and annexed as aforesaid, the award to which the same shall relate shall to all intents and purposes be a valid award for the purposes of this act, notwithstanding any informality or irregularity may in fact have occurred in any of the proceedings or things directed by this act to be had or done prior to or upon the execution thereof, yet so that this present clause shall not give effect to any such award where the same shall not be duly signed by the commissioner or commissioners, or where the agreement in pursuance of which the same shall be made shall be vacated under an order of the said Court of Exchequer, pursuant to the provisions herein-before in that behalf contained.

NOTES OF THE WEEK.

BANKRUPTCY REFORM.

It is now strongly rumoured that the Bankruptcy Bill will not be pressed in the present session.

NEW PEERS.

We have seen a list of twenty new peers who are to be created immediately.

LEGAL SINECURES.

The lucrative place of Clerk of the Errors in the King's Bench is just vacant by the death of Mr. Smith. We earnestly suggest to the Government that this is the proper time to show that they have the cause of law reform truly at heart by abolishing this sinecure.

SUPERIOR COURTS.

LORD CHANCELLOR'S COURT.

If a counsel assigned by the Court to a pauper chooses to withdraw from the suit, and other counsel undertake it, this circumstance is not necessarily a ground for obliging the pauper to give security for the costs.

Sir *Edward Sugden* moved that the plaintiff, who sued *in formâ pauperis*, should give security for the costs of an appeal. He first took an objection to the form of the appeal. Mr. *Girdlestone* had been assigned as counsel for the plaintiff in the cause, on her application upon the usual allegation that she was a pauper. Her bill was dismissed at the hearing; and, being dissatisfied with that decision, she determined to appeal; but Mr. *Girdlestone*, not being of opinion that there were grounds for the appeal, had declined to sign her petition. She thereupon applied to other counsel, and Mr. *Knight* and Mr. *Spurrier* signed the petition now before

the Court. This he (Sir *Edward Sugden*) insisted was irregular, and that as counsel had once been assigned, no others could act until the former had been discharged from the office the Court had assigned to him. He further insisted, that the plaintiff, appearing in court by other counsel than the one originally assigned, must be assumed to have obtained the services of the present counsel otherwise than gratuitously, and that therefore she was dispaupered. The right of the defendant to have security for the costs of an appeal was therefore, he submitted, clear.

Mr. *Knight*, who was not now in the appeal, said he had signed the petition of appeal upon his deliberate judgment that the case was fit to be reconsidered.

Mr. *Pepys* and Mr. *Spurrier*, who appeared for the petitioner, opposed Sir *E. Sugden's* motion. In the first place, he contended, that although one counsel was assigned, the plaintiff had a right to the assistance of any other barrister who was content to render it gratuitously; and that right became still less questionable, when the reason of her applying to other counsel was, that the one that had been assigned declined to act for her in the prosecution of what she was advised she was entitled to claim. With respect to the other point, he said, that, as far as he was concerned or knew any thing of the case, no fees had been paid by the plaintiff, and that therefore the application must be dismissed.

The *Lord Chancellor*, having enquired of the Court of King's Bench what the practice there was, said he was clearly of opinion that some restrictions ought to be imposed upon the proceedings of paupers, who had it in their power, and who often exercised that power, of putting the parties opposed to them to most needless and vexatious expense and trouble. He had seen, in the course of his practice, many instances of this. The Court thought and knew, and in assigning counsel they took the best security they could have, relying, as they had good reason to rely, upon the honour and integrity of the Bar, who, to their credit, were always ready to render assistance to persons who were too poor to obtain it in the ordinary way, against the pretence of one party seeking a wrong being made the instrument of oppression against another. In assigning counsel, the Court had assigned one gentleman; but he did not think that thereby others were excluded. And although he thought it would be wise if Courts of equity should confer with the heads of other Courts, for the purpose of laying down a general rule on a point of practice very much unsettled in all of them, he did not think that in this case the motion could be granted. — *Carter* v. *Long*. L. C. June 2. 1831.

VICE-CHANCELLOR'S COURT.

PRACTICE. — NOTICE OF MOTION.

There is no order in force which obliges the insertion of a counsel's name in a notice of motion.

Mr. *Wray* being called on to move, was proceeding to make a motion, when

Mr. *Ching* objected to its being heard, as the name of counsel was not introduced in the notice of motion.

The *Vice-Chancellor* said there was no order existing on that point, and overruled the objection. — *Anon*. V. C. July 20. 1831.

COURT OF KING'S BENCH.

LIBEL. — PUBLICATION. — SURPRISE.

The Court will not grant a new trial, on the ground, that if certain evidence had not been believed, the jury would have given a smaller amount of damages.

The *Attorney General*, on behalf of the defendant, applied for a rule *nisi* for a new trial in this case. The defendant had written several letters to the plaintiff and his wife, on the subject of a criminal intercourse supposed to have passed between him and the latter. These letters, written to them only, could not be considered as published letters, and therefore could not be made the foundation of an action for libel. It was contended at the trial, that some of these letters, addressed to Mrs. Landseer, were sent by the defendant to the house of the plaintiff's father, with the intent that they should be seen by the father, or some of the plaintiff's brothers or sisters. In order to make out this, an anonymous letter was handed in, addressed to the father or a brother of the plaintiff, intimating that a criminal intercourse was going on between the defendant and Mrs. Landseer, and calling on the family to attend to their correspondence, and enquire into the matter, for the vindication of its own honour. In consequence of this anonymous letter, some of the defendant's letters to Mrs. Landseer were opened by the plaintiff's brother, or some other of the plaintiff's family. Then, in order to show that this was a publication intended by the defendant, evidence was given, that the anonymous letter was in the handwriting of the defendant himself. If that were sufficiently proved, there was admissible evidence of publication to go to the jury. But then, the anonymous letter was not that which was relied upon as libellous, and was not set out in the declaration. Therefore the defendant, by the production of this letter, was taken altogether by surprise; as neither he, nor any one for him, had ever seen the letter before. The first witness called to prove it could not speak to the handwriting either one way or the other, although the witness was a man in whose house the defendant had lodged, and who was well acquainted with his handwriting, and had no hesitation in proving the letter addressed to the wife to be in the defendant's handwriting. Then Caroline Pocock was called. She was Mrs. Landseer's sister, and therefore much interested in vindicating Mrs. Landseer for the sake of the credit of the family. It was a long letter, occupying three pages; and the lady looked over the whole very deliberately, and at length pointed out three words, from which she ventured to swear to her belief that the letter was in the handwriting of the defendant. It was admitted by both witnesses, that it was a disguised hand. The jury, however, found a verdict for the plaintiff, damages 300*l*. But, as this rested on the anonymous letter, which

placed matters on a very different footing from the rest of the case, the defendant was very anxious to relieve himself from the imputation of having been the writer of that letter. The plaintiff now swore, in the most positive and distinct terms, that the letter was not in his handwriting; and that he knew nothing about it, nor about the person who was the writer; and that neither he, nor any one for him, had seen it till it was produced by Mr. Landseer, sen. This partook so much of the character of surprise, that he hoped their Lordships would think it proper that the case should be sent to a new trial.

Lord *Tenterden* C. J. The defendant pleaded a justification, and you gave no evidence of that.

Attorney-General. No; I was instructed not to offer any evidence in support of the justification, and I was doubtful whether your Lordship would receive evidence on that plea.

Lord *Tenterden* C. J. Certainly, I should have hesitated before I allowed a man to give evidence to prove his own turpitude; but I am not prepared to say that I should not have received it. But suppose this letter not to have been in the handwriting of the defendant, still there remained the letter sent by him to Mrs. Landseer's father, and the two letters sent to Mr. Evans, the attorney, and therefore the verdict must have been for the plaintiff, though the damages might perhaps have been less. The first witness said the letter was written in a disguised hand, and he could not state as to his belief either one way or the other; but Miss Pocock had sworn to her belief that it was the defendant's handwriting. Under these circumstances, the Court is unwilling to set the example of sending a case to a new trial, merely on a chance of the reduction of the damages, in case another jury should think that the witness was mistaken.

Rule refused. — *Landseer* v. *Robinson.* T. T. May, 1831.

ORDER FOR PARTICULARS. — TIME TO PLEAD.

Where an order for particulars, and an order for time to plead, have been obtained, the original time for pleading will run during the time given by the order, unless it is expressed in the order for time to plead, that the time granted by it is not to begin to run till after the delivery of particulars.

Hutchinson showed cause against a rule obtained by *S. Hughes*, on a previous day, to set aside an interlocutory judgment, for irregularity in being signed too soon. Before the time for pleading had expired, a summons for time to plead, and another summons for particulars of plaintiff's demand, were taken out by the plaintiff's attorney. At the end of the printed form of the summons for time, the Judge's clerk added the words — "after the delivery of particulars." These words were scratched out; and it was sworn by plaintiff's attorney, in answer to the rule, "that *he* erased them because he would not consent to an order for a week's time after delivery of particulars." But on the back of the summons there were the words — "Take a week on the usual terms;" and, on the back of the summons for particulars, "Take an order." His orders were accordingly drawn up *in the usual form.*

The order for time was dated May 24.
The order for particulars - 25.
Particulars delivered - - 28.
Judgment signed - - June 1.

The order had been drawn up contrary to the terms of the plaintiff's consent: that the words "after the delivery of particulars," expressly appeared to have been struck out on the form of the summons; and that, when orders for time and particulars were given out together, the order for particulars had no effect on the order for time.

Hughes, in support of the rule, urged, that the orders were drawn up in the usual form; and that, in the order for particulars, it was expressly stated, "that, in the mean time, all proceedings should be stayed; and he referred to 1 Tidd's Practice, p. 598. 8th ed., where it was laid down, that "after the delivery of a bill of particulars, the defendant in the King's Bench has the same time to plead as he had when the summons for it was returnable;" and no distinction is taken where the summons and order for time to plead state that it is to be "after delivery of particulars," or without these words, as is most frequently the case: and that, if the order for particulars were drawn up improperly and contrary to the consent given by the plaintiff's attorney, he ought, when he was served with the order, to have returned it or got it discharged.

Lord *Tenterden* C. J. The order for time ought to have stated on the face of it that it was to be "after delivery of particulars." I have frequently put in these words with my own hand.

Parke J. I have great doubt on this point.

Rule discharged.*—*Adams* v. *Drummond.* T. T. June 13. 1831.

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* The practice of requiring particulars of demand is of modern origin. *Per cur. Anon.* 6 Dowl. & R. Indeed, no trace of it can be found in Crompton and Richardson, and the earlier books of practice.

The above case must be considered as laying down a new rule upon this subject, or at least of modifying and explaining the rule which is laid down in the books of practice; and therefore where an order for time is obtained, and more especially where summons for time and for particulars are taken out together, care should be taken to express in the order for time that the time obtained, whether by consent or otherwise, is to be "after delivery of particulars;" or else the time for pleading will be considered as running on, and will expire at the end of the time granted, *if the particulars have been delivered within that time;* for it is conceived the rule must be taken with that qualification, and that the plaintiff would not be at liberty to sign judgment *until he has complied with the order by delivering particulars.* This was laid down in *Hifferman* v. *Langelle*, 2 Bos. & Pul. 363.; and it was then decided, that though a plaintiff cannot sign judgment until the order for a particular has been complied with, yet he may do so after

SETTLEMENT BY RENTING A TENEMENT.

Where a pauper complied with the provisions of the 6 Geo. 4. c. 57., in renting a tenement and land of the annual value of 25l., but the tenement and land lay in two different parishes, and the pauper did not know how much in each; Holden, that evidence was admissible to show the value of the part in each parish.

The pauper had hired and occupied a house and land at 25*l.* per annum, for a year, and paid a year's rent. Part of the land was in Pickering, and the house and the other part of the land in the township of Newnham. The pauper did not know how much was in each parish.

Lord *Tenterden* C. J. If evidence is not admissible to prove the value in the township of Newnham, it is clear that a man who rented from 300*l.* to 400*l.* a year would not gain a settlement, if an acre only were in another parish.

Parke J. The rent must be apportioned; and if one third of the land in value is in Pickering, and two thirds in Newnham, the sessions must decide the settlement accordingly.

Case sent back to sessions to apportion the value in each parish. — *Rex* v. *Pickering*. E. T. April 21. 1831.

ORDER OF MAINTENANCE OF GRANDCHILDREN. — PRESUMPTION.

It is not necessary, in case of an order for maintenance by a grandfather of his grandchildren, that the death or poverty of the father should be stated on the face of the order.

Follett showed cause why a *certiorari* should not issue, to remove an order made by two justices on the defendant, to pay a sum of money for the support of his grandchildren. This order is founded on 43 Eliz. c. 2. and 59 Geo. 3. c. 12. § 25. The objection made to the order is, that the order did not state that the father of the children was dead, or unable to maintain his children. (Nol. 2. 263-4.) It is not necessary that this should appear on an order. This is not a conviction, but an order; and in an order all that need be set out is enough to show the justices' jurisdiction. The acts show who shall first be liable; or that the grandfather shall not be liable, unless the father be unable.

Rogers, contrà, cited *Rex* v. *Munden*, Strange, 190.; and contended, that the justices ought to show, on the order, why they passed over the father. *Rex* v. *James*, Cald. 461., *Rex* v.

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having delivered the particular, provided the time for pleading be then elapsed. Judgment cannot, however, be signed till twenty-four hours have expired after the delivery of particulars, though the time for pleading is out, and a demand of plea made twenty-four hours before judgment signed. *Ramsay* v. *Lord Reay*, 2 Bos. & Pul. N. R. 361. The same rule was adhered to in *Decker* v. *Thompson*, 3 Bos. & Pul. 319., where it was held, that if defendant gets an order for security for costs, though the plaintiff gives it immediately, still he must wait till the opening of the office *on the next day* before he can sign judgment. The effect of an order for particulars is different in the King's Bench from what it is in the Common Pleas. In the latter Court it was held, in *Hifferman* v. *Langelle*, 2 Bos. & Pul. 363. that the order for a bill of particulars does *not* suspend the time for pleading: and therefore, where a declaration was delivered *de bene esse*, indorsed to plead in —— days, the Court said, that the indorsement amounted to a notice to plead *according to the rules of the Court*, viz. in four days; and as the declaration was delivered on the 17th, and the order for particulars which was obtained on the 19th, was complied with on the 20th, a judgment signed on the 21st for want of a plea was holden to be regular. In *Mowbray* v. *Schuberth*, 13 East, 508., it was expressly decided by the Court of King's Bench, on reference to the Master, that a defendant has *the same time* to plead after the delivery of particulars as he had when the summons for it was returnable. It should seem, however, that this case was rather broken in upon by *Hughes* v. *Walden*, 5 Barn. & Cres. 771., where *Abbott* C. J. says, "When a defendant obtains a rule which stays the plaintiff's proceedings, he is not entitled (as contended for) to the *same* time for the purpose of taking the next step as he had when he obtained the rule. But I think that a defendant in such a case should have a *reasonable time* allowed him for the purpose of taking his next proceeding." In *Glover* v. *Watmore*, 5 Barn. & Cres. 769., where a summons for better particulars was obtained by defendant four days before the time for pleading had expired, but the plaintiff's attorney did not attend till the third summons, when the order was referred, and immediately afterwards signed judgment (the time for pleading having expired) the Court set aside the judgment as having been signed too soon, for that the principal delay was created by the plaintiff — 1st, in not delivering any particulars until the 2d of May, although the order for it was obtained on the 21st of April; and, 2dly, in not attending the first or second summons for better particulars. From all these cases, it should seem that the Courts exercise a discretion according to the circumstances of the case. In the case of *Adams* v. *Drummond*, above reported, there certainly was ample time for the defendant to have pleaded between the 28th, when the particulars were delivered, and the 1st of June, when judgment was signed; and this, coupled with the absence of the words "after delivery of particulars" in the order, they appearing expressly to have been erased from the summons, induced the Court not to set aside the judgment: for it is conceived, that the fact which the plaintiff's attorney stated in this affidavit, that he only consented to give a week's time from the 28th, without reference to the order for particulars, could not properly be taken notice of by the Court: as in *Joddrel* v. ——, 4 Taunt. 253., the Court held, they must look to the order, and that it should be always properly drawn up, and served; and the Court would take no notice of a summons with a consent indorsed on it to give relief to the plaintiff, though the defendant had proceeded in direct breach of good faith.

M'Gregor, 3 Bos. & Pul. 106., as to convictions and orders; *Rex* v. *Damon*, 2 B. & A. 378.; Vin. Abr. *Poor*, c. 5. *Rex* v. *Robinson*, 2 Burr. 800., was an indictment against a grandfather, for disobeying the order made on him to support his grandchild, which order recited the death of the father. The father might be a rich man [Lord *Tenterden*, or a pauper, or even dead, for any thing that appears on the order.

Rogers. The jurisdiction of justices does not arise, unless the father is unable to maintain his children.

Lord *Tenterden* C. J. The question is, whether it should appear on the order that the father was dead, or unable to support his children. Nothing in the acts prescribes such a course. We must presume that the justices did right in making the order on the defendant.

Littledale J. The two acts are the same. It is not necessary that the order should show the death or inability of the father. The justices have a discretion.

Parke J. It is unnecessary for the justices to set out more in the order, than that they order the grandfather to support the children.

Taunton J. The Court will intend every thing in support of an order, not of a conviction.

Rule discharged. — *Rex* v. *Cornish*. T. T. May 28. 1831.

SETTLEMENT BY RENTING LANDS UNDER THE 13 & 14 CAR. 2. c. 12.

Where a pauper rented land worth less than 10l. a year, but worth more with the addition of ploughing and manuring, by the landlord: Holden, that he acquired a settlement, although the ploughing and manuring were after the occupation commenced.

The pauper hired a field, which was ploughed and manured by the landlord after the pauper entered, at 12*l. per annum*. This being before 59 G. 3. the settlement depended on 13 & 14 C. 2. c. 12. There was an agreement before the pauper entered, that the landlord should plough and manure the land. Without the ploughing and manuring the land was not worth 10*l.* a year.

Follet contended, that this was not sufficient to confer a settlement, as the tenement at the time the pauper took it was of less value than 10*l.* If the pauper had become chargeable before the landlord had ploughed and manured the land, would the pauper have been removable under the 13 & 14 C. 2.? *Rex*. v. *Aston, near Birmingham*, 6 M. & S. 54. cited on the same side.

Coleridge, contrà. This case is, in every respect, the same as *Rex* v. *Poulton with Fearnhead*, 6 M. & S. 252.; and all the arguments now used and cases cited were used and cited in that case.

Lord *Tenterden*, C. J. This case is similar to the case of *Rex* v. *Poulton with Fearnhead*, and the pauper gained a settlement.* — *Rex* v. *Hunshaw*. T. T. May 28. 1831.

* The decision in the case of *Rex* v. *Poulton with Fearnhead*, 6 M. & S., is as follows: — "The renting of twenty-seven perches of land for growing potatoes at the price of 2*s.* 6*d.* per perch, amounting to 3*l.* 7*s.* 6*d.*, under an agreement with the landlord that he should furnish the tenant with manure sufficient for the culture of potatoes, was holden to be a renting at the price above mentioned, *although the manure was not furnished until after the holding commenced*, and the value of the land to be let per acre on the ordinary terms of husbandry usual in letting farms, according to the course of good husbandry, did not exceed 4*l.* per acre; but, when let on the terms above-mentioned, it was of the value of 2*s.* 6*d.* per perch.

MINOR CORRESPONDENCE.

To the Editor of the Legal Observer.

SIR,

THE following case may serve to show the practical effect of 1 Will. 4. c. 7., for the more speedy Judgment and Execution, &c.: —

In Easter term last, an attorney residing in the country brought an action against his client there, for business done by him, laying the *venue* in Middlesex. In Trinity term following, the cause was set down for trial, and notice given that the record would be taken down to Westminster Hall, and the cause called on as undefended. The defendant's attorney informed the agent in town that there was a good defence, and that the cause would be defended. In due course the cause came on, and the plaintiff was nonsuited, on the cross-examination of his son, who, on the defendant's counsel handing to him a bill of the same particulars, proved, that at the bottom thereof there was the plaintiff's own handwriting of settlement some years back. On this Lord *Tenterden* directed the plaintiff to be called, but he would not certify under 1 Will. 4. c. 7.; of course the defendant was put to considerable trouble and expense, and had the court fees to pay, and he must now wait till November before he can proceed. It is difficult to imagine in what case a Judge will certify for an injured suitor to have the benefit of this act of parliament.

S.

CERTIFICATED CONVEYANCERS.

Allow me to suggest a remedy for the evil, of which such just complaint has been made, of disreputable persons practising as certificated conveyancers, viz. that the bond, which is invariably given to the benchers on the admission of a student, should be conditioned, amongst other things, to restrain the student from exercising the unprofessional practice of receiving business from any but solicitors, except where he is himself qualified to be admitted as a solicitor.

A TEMPLAR.

ANSWERS TO QUERIES.

SERVANT'S CHARACTER.

1. IN answer to this query (vol. ii. p. 176.), I believe there is no way of compelling a master to give a servant's character. It was decided in the case of *Carrol* v. *Bird*, 3 Esp. 201., that

an action will not lie at the suit of the servant against his master for not giving him a character. This, however, is only a *nisi prius* decision. The withholding a character must, generally, arise from malicious feelings, for it has been decided, that in order to obtain damages for libel or slander, the servant must prove the character to have been false, and also the existence of malice in the master. *Child* v. *Affleck*, 4 M. & R. 338.

P. H. L. B.

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2. Lord Kenyon, in *Carrol* v. *Bird*, 3 Esp. 201., decided that no action lay for refusing a character; and added thus: — "By some old statutes regulations were established respecting the characters of labourers; but that in the case of domestic and menial servants there was no law to compel the master to give the servant a character; it might (says his Lordship) be a duty which his feelings might prompt him to perform, *but there was no law to enforce the doing of it.*"

W. H. M.

*** We have received answers to this question from other correspondents, who refer to the same case.

TENANT FOR LIFE. P. 176.

1. Assuming the remainder to be *contingent* (vide 2 B. & C. 926.), it is clear the tenant for life can only destroy it by destroying his own estate. This done, the estate must revert back to the heir at law of the testator. If *A.* be such heir at law, he can, by feoffment or fine, acquire the fee; if he be not such heir, he can only acquire the fee by connivance with the person filling that character. He may, if he choose, take the common risk of acquiring a fee by fine and non-claim. See the case of *Hasker* v. *Sutton*, 9 Moore, 2.; 1 Bing. 500.; 2 Sim. & S. 513.

H. F. G.

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2. It appears to me that the querist has omitted the most material circumstance connected with the solution of the query above referred to, viz. Whether *A.*, the tenant for life, has any child *in esse*, or *en ventre sa mère*; because I apprehend that if there be any child the contingent remainder cannot be defeated by fine or otherwise, as the remainder would no longer be contingent, but vested, 1 Rep. 66. 135. 2 Black. Com. 171.; and on the contrary if *A.* has no child he may bar the contingent remainders by fine, feoffment, or recovery. 1 Co. 66. 1 Salk. 224. On cursorily perusing the query, it might appear that the limitation to *B.* was void, on the ground that a fee cannot be mounted on a fee; but as it is not derogatory from the effect of that to *A.*'s children, but only by way of substitution in case of failure, I think that such limitation is legal. *Vide Loddington* v. *Kime*, 1 Salk. 224.

H. Y. W.

LEGACY. P. 176.

1. It would seem that the question turns upon whether the daughter, *M. H.* took a *vested* interest in the legacy *at the death* of the testatrix: if she did, her personal representatives are of course entitled at the death of the son *T.* I understand the rule to be, that in such a case the legacy vests immediately upon the death of the testatrix, as "*debitum in præsenti, solvendum in futuro*," the *time* being annexed to the *payment* only, and *not* to the *legacy* itself. See *Jackson* v. *Jackson*, 1 Ves. 217.; *Corbyn* v. *French*, 4 Ves. Jun. 419.; *Booth* v. *Booth*, 4 Ves. 399.; and the opinion of the Vice Chancellor, contained in the report of *Nayler* v. *Wetherell*, 1 L. O. 142.

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2. I should consider the husband to be entitled to the legacy on his taking out administration to his wife. The case is not without doubt as to its being vested or contingent, but I incline to the above opinion: there are many cases on the latter point. See particularly *Long* v. *Prigg*, 8 B. & C. 231. *Jones* v. *Mackelwain*, 1 Russell, 220. and cases cited.

INFANT. — CRIM. CON. P. 192.

Although a direct case cannot perhaps be cited, that infancy is no defence in crim. con. yet no doubt can be entertained that it would *not*, since the cause of action arises *ex delicto*, and in all of which he is liable. See *Bristow* v. *Eastman*, Peake's Rep. 291.

W. H. M.

COPYHOLD. — EXPENSE OF ADMISSION. P. 128.

I think that, according to stat. 7 Geo. 2. c. 20., the expense of *E.*'s admission, which was consequent on the mortgage, must be borne by *A.*, and not by *B.*'s executors: but as the old estate is in *A.*, he may enter without a new admittance, or payment of any fine. — *Rol. Abr. 505. Fisher's Copyh. 98. Coke, Copyh.*

H. Y. W.

RELEASE UNDER WILL. P. 160.

In answer to J. W.'s query, as to the effect of a release by will, when the testator subsequently takes a bond for the debt, I beg to observe, that, except with regard to *real* estate, a will is considered as speaking, not *at the time of its date*, but at the *death of the testator*; and, consequently, the will would operate to release the bond subsequently given, that is, *in equity*; but, at law, I conceive the testamentary release, being only a *legacy*, would not be noticed by the Court if the executor brought an action for the debt. A Court of equity, however, would most assuredly grant an injunction, and fix the executor with costs for his folly; unless a deficiency of assets rendered the recovery of the debt necessary.

E.

JOINDER. — PARTICULARS. P. 160.

1. *B.* may ascertain on what account *A.* is suing, in one of two ways. If the debts are of such a nature as to render it necessary to insert counts in *indebitatus assumpsit*, or *debt* on simple contract, a particular of demand must, by the late general rule of all the Courts, be delivered with the declaration. If the debts are not of that nature, the declaration will contain a special count or counts only, and will of itself disclose the particular account on which the action is brought.

B. seems to be put by mistake for *A.* in the third line of the query.

Y. Z.

2. In considering this query, another difficulty arises, which does not appear to have struck H. C., viz. how the defendant could plead in abatement, if the plaintiff should delay the delivery of particulars till after the time for pleading was expired. Now, it seems to me, that the only way in which this difficulty, and those suggested by him, can be obviated, is by the defendant's pleading in abatement at once, and *then* taking out a summons for particulars. Should it appear by the particulars that the action is brought for the joint debt, the plea will stand right; and if the particulars of the separate debt be delivered, a summons should be taken out for leave to withdraw the plea in abatement, and substitute a plea in bar, which may be done. See Tidd's Prac. 1266. *Sed qu.* Should the plaintiff comprise in his particulars both the joint and the separate debt, what course should the defendant then adopt? It appears to me, he should let the plea in abatement stand, and go to trial upon it, when, if supported, the plaintiff would fail as to the joint debt; and he could, at most, recover only so much as he could *prove* to be due on the separate account.

E.

QUERIES.

UNCERTIFICATED ATTORNEY.

An attorney (inadvertently, through the error of his agent) omits to take out his certificate for one year, and is, within four months after the end of that year, re-admitted on payment of a nominal fine, and duty for the omitted year. Can he maintain an action for business done while he was so inadvertently uncertificated? I am aware of the late case of *Coren* v. *Sharpe*, 1 Barn. & A. 586., but it does not seem to reach this.

A. Z.

LEGACY.

A gentleman bequeaths all his freehold, copyhold, leasehold, and real estates to his wife for life, and after her decease to *B.* (an intimate acquaintance, but no relation) and her heirs; but *in case she should have no heirs*, then he bequeaths the same *after the decease of his said wife* to *C.*, his heirs and assigns for ever. *C.* would have been the testator's heir at law in case he had died intestate. What kind of estate does *B.* take, who is married, after the wife's death?

DECLARATIONS.

In a *serviceable* process, issued out of the King's Bench, stating the cause of action "in a plea of *trespass*," can the plaintiff declare *in debt*?

P. H.

LANDLORD. — SHERIFF.

A. is tenant to *B.* under an agreement for a lease, at an annual rent payable half-yearly. An execution is put on the premises by a creditor at the time when there is one year and a half's rent due; upon which *B.* gives the requisite notice to the sheriff; but he, notwithstanding, proceeds to a sale, the produce of which amounts only to half the amount of the year's rent. Is *B.* bound to receive the produce of such sale in satisfaction of his demands, or can he recover the whole from the sheriff by an action? If so, by what kind of action? and who is to pay the sheriff's expenses and poundage?

F. M.

EXECUTORS AND RESIDUARY LEGATEES.

There is a small sum of money standing in the funds in the name of *A. B.* and *C. D.*, the interest for a person for life. *A. B.* survived *C. D.*, and considered the stock his own when the life dropped. *A. B.* died, leaving three persons his "executors and residuary legatees," all of whom are now dead, and the annuitant still alive; the executors of the survivor of them receive and pay over the dividends. Who is entitled to the money when the annuitant is dead? the three "executors and residuary legatees" equally between them, *i. e.* their representatives, or the representatives of the surviving executor and residuary legatee?

PRACTICE. — BANKRUPTCY PETITIONS.

The commissioners having taxed, under an order, a solicitor's bill of costs, found a balance to be due from the solicitor. The assignee, to whom such balance is payable, having personally demanded the same, presented a petition for a four day order. Is it essential that the order should be served by the person entitled to receive the money? The order is obtained upon a personal demand of payment having been previously made. *Wilkins* v. *Stevens*, 19 Ves. 117., seems inapplicable to bankruptcy cases: is there any fuller report of that case, or any other authorities on the question? See also L.O. vol. ii. p. 41.

S. W.

LANDLORD AND TENANT.

If a landlord recover possession of his house under the statute, half a year's rent being in arrear, and the premises unoccupied, can such landlord afterwards proceed at law against the late tenant for recovery of such rent?

E. R. P.

FALSE ARREST. — COGNOVIT.

A., *B.*, & *C.* (the two former as sureties for the latter) join in a promissory note for 80*l.* payable by quarterly instalments, which are, from time to time, made until the death of *A.*, one of the sureties, and a relation of the principal, *C.*, when default is made in payment of the balance due, and *B.*, the surviving surety, is arrested and held to bail for 50*l.* and upwards. *B.*, imagining the amount sworn to by the plaintiff to be correct, signs a *cognovit* for such sum, and pays down the costs of the action; but, upon subsequently conferring with the principal, *C.*, he discovers that credit has not been given for a sum of money actually paid, which would have reduced the balance to a sum below 20*l.*; and that, con-

sequently, he, *B.*, has been illegally held to bail. What is *B.*'s remedy? and is he prejudiced by having signed a *cognovit* subsequent to the arrest? M. B.

MISCELLANEA.

ANCIENT WRIT OF ANNUITY.

It appears that anciently lawyers and doctors were sometimes paid for their advice by stated annuities. When this was the case, the lawyer was not bound to travel, but only to counsel where he might be found. The client was presumed to be able either to go to his lawyer or send a statement of his case; not so the doctor, as appears by the following report:—

"*Master Simon de Brendon* v. *the Prior of Lewes.* Writ of annuity for 20*l.* arrear. Plaintiff declared that the predecessor of the prior granted him an annuity for the term of his life. — *Candish.* It appears that it was granted for his counsel and aid, and Master Simon is doctor of physic, and defendant's predecessor, the successor of him who granted the annuity, was ill, and sent to plaintiff one A. of B., and requested his counsel and aid in the presence of A. C., and he would neither counsel nor aid him, whereby the annuity is extinct. — *Belknap.* It is a double plea to say he requested his counsel and also his aid, *et non allocatur*; for the one is dependent upon the other. Wherefore he afterwards said, the deed does not show expressly that plaintiff must travel to him, but that he is to have our counsel and aid, that is, in the place where we may be found, and he has not shown what his complaint was, so that we could give him counsel, nor does the deed show that we were to give him counsel rather in physic than in any other thing. — *Candish.* We have alleged that you are a physician, and that the annuity was granted on that account, and the malady he could not himself have known, in as much as it is a private thing which appears only by inspection of urine, which he could not himself understand, and therefore could not certify to you. If I grant an annuity to one *pro consilio et auxilio habendo*, that shall be understood in such matters as he best understands; for if such annuity be granted to a lawyer, he ought to aid and counsel in the law. — *Finchden.* It has been adjudged that where an annuity was granted to a lawyer *pro consilio*, &c. he is not bound to travel, but only to counsel him where he may be found; therefore, since the prior did not go to him he was not in default, and therefore he could not give his counsel unless the prior signified to him what was his disease; for if one grant you such annuity, you cannot counsel him unless he disclose his case. — *Candish.* As to the law every one knows how his case stands, in point of fact, on which I can give advice; but a disease is so secret that no one can know it except a physician; therefore, as the party could neither inform the physician of his case, nor travel to him on account of his disease; the physician was bound to go to him. — *Thorpe* to *Candish.* The deed is *pro consilio et auxilio*, &c. and if he were learned in any science other than physic, as surgery, law, or the like, tell me in which he is bound to counsel and aid him. — *Candish.* In that for which the annuity was granted. — *Thorpe.* Put it that he knew not how to counsel or aid, would the annuity be extinct? — *Candish.* No truly, for he is not bound to aid or counsel him beyond his knowledge; but when we have alleged that he was a doctor of physic, and that that was the reason why the annuity was granted, *sc. pro consilio et auxilio suo nobis et monasterio nostro impenso et imposterum impendendo*, and that our predecessor sent to and requested him, &c. and he does not deny it, it seems that the annuity is extinct. — *Belknap.* You have not said that you informed us what was your complaint, so that we could give you our counsel, and the deed does not show that we ought to travel. Besides, we say that the prior purchased the church of Thames to his own use, of which Master Simon was in possession, and Master Simon resigned the church to them, and that the annuity was granted on that account. The remainder of the case turned on a point of pleading, and no judgment is reported." — *Willcock's Medical Law.*

CHRONOLOGICAL RECKONING.

The dates in the Tables of Kings and Queens, in *Moore*, *White*, &c. are given according to the *old style*, to the reign of George III., the commencement of whose reign is according to the *new style*. This indicates a mistake in the tables, as it reduces the length of George the Second's reign to thirty-three years, four months, and three days; instead of thirty-three years, four months, and fourteen days, as it now stands in the tables.

The reign of Edward III. began January 25. 1327, old style, when his father was deposed. But it appears that long before *our* alteration of the style, the year in chronological reckoning was supposed to commence January 1., though the legal year did not commence till March 25., the intermediate time being doubly indicated, as February 15. 172$\frac{4}{5}$, and so on. In the old volumes of Almanacs, say for 1671, in *Gadbury's* and *Saunders's*, nineteen years and six months will be found specified as the length of Edward II.'s reign, which would not be the case if they had reckoned the year to begin in March. The tables in *Wing's* and *Dove's* Almanacs for the same year are often wrong in the years and months, and almost always in the days, because they reckoned twenty-eight days to the month. But all these tables agree with our present tables as to the commencement of each reign, errors of the press excepted. — *Dr. Olinthus Gregory.*

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——— "Quod magis ad nos
Pertinet, et nescire malum est, agitamus."
HORAT.

LORD WYNFORD'S BILL,
AND
THE LAW OF DEBTOR AND CREDITOR.

WE are rather surprised that one of the principal features of this Bill has not excited the attention of the public journals in any other than a very casual manner; and we can ascribe the neglect only to the all-absorbing interest of the important measure now before the House of Commons. We allude to that part of the learned Lord's Bill in which he seeks to bring within the Bankrupt Laws all *absentees after three months*, provided they are in Europe, and that notice has been given in the Gazette and a newspaper where they last resided. So that if an invalid should visit the Continent for the benefit of his health, a man of science depart the realm on a tour of discovery, or even if a professional man left his chambers somewhat suddenly in quest of evidence abroad, or for a long-vacation excursion, and did not return in due time, or make ample provision for his debts (which might not be due when he left England), he might chance to find himself on his return "gazetted" in no very enviable character. We confess we do not see the urgent necessity for this extraordinary extension of the bankrupt laws. Amongst traders they may be very appropriate and important. Punctual payment, and, in case of default, a speedy distribution of the assets, are primary objects; but to subject the land-owner (whose rents may be in arrear) or the man of small fortune, or the members of the learned professions, whose incomes cannot always be regularly collected, to the machinery of the Bankrupt Court, would certainly diminish their means of ultimately meeting their engagements, but would confer no adequate advantage on their creditors. Such, at least, is our present opinion; and after reading * all that has been urged on the subject, we cannot by any means recommend the extension of the Bankrupt Laws beyond the class of traders to which they are at present, we think, very judiciously confined.

It is indeed impossible that the legislature can be induced to subject all classes of persons to the operation of those laws. If there were no other objection, we think that the following would be considered sufficient: — In order to try the question "whether a man (not in trade) has absented himself for a certain length of time with the intention to delay his creditors," the unavoidable expence of the enquiry, in addition to the administration of the effects under a commission, would in general be so considerable that the cure would be worse than the complaint.

This objection would not apply to those cases in which the debtor remains in gaol, consuming his substance to the injury of his creditors; but if imprisonment for debt is to be abolished, these cases will no longer exist. The few who live in luxury within the rules of the prison, as well as the many who live in penury within its walls, will equally be discharged. And we are desirous, that amidst the anxiety to ameliorate the condition of the debtor, the interests of the creditor should not be altogether neglected. The attention of the legislature to the rights of the one should be directed at the same time that relief is extended to the other.

We have no intention at present to enter on the wide subject of the various laws relating to debtor and creditor, but shall confine ourselves to such parts of them as

* See the debate on the subject in the House of Lords in our "Monthly Record" for July, p. 204.

more immediately relate to the subject of the bill before us.

If it be intended to abolish, or even in a considerable degree to alter, the law of arrest, and particularly by way of execution, we agree that several alterations must necessarily be made in the remedies afforded for the recovery of debts. There can be no doubt that, if it were practicable, it would be infinitely better to revise by one general statute, or a series of contemporaneous acts, the whole law of debtor and creditor, comprising not only arrest on mesne and final process, but the various modes of execution, and the several kinds of property chargeable therewith.

If a general plan of amendment cannot be carried into effect, and it be deemed expedient to proceed by "bit and bit"—for instance, to abolish the practice of arrest—we then think it will be imperative on the legislature to devise some immediate measure for the benefit of creditors, by which, when they are deprived of the power of enforcing payment by the terror of imprisonment, they may be enabled in a more complete and summary way to reach the property of the debtor. We presume that funded property must be made liable to the payment of debts; and it may be contended that the power of attaching money and effects in the hands of bankers or other persons should be conferred on creditors; but this, we conceive, must be done under certain restrictions, or the mischief it will produce will be greater than the evil which is sought to be removed. It is evident, indeed, that in altering the established system, it is not sufficient merely to repeal that which seems objectionable, but something better must be substituted in its stead.

Our impression is, that it would have been preferable to hasten the reports of the Common Law Commissioners, in order to bring the whole of their scheme of improvement completely before the public; and the more especially so, as these reports are accompanied by the evidence both of learned and practical men, upon which the conclusions of the Commissioners have been founded. We should then be enabled to judge of the structure by the materials employed in raising it, and should have the facts as well as the arguments before us.

With the result of the deliberations—the labour and experience of the Commissioners, and those of many members of both branches of the profession—the legislature would be enabled to arrive at a safer conclusion than can reasonably be expected from the unassisted wisdom and study of any single individual, however gifted.

We understand that the learned Commissioners are inclined to recommend that the law of arrest should be altered — to what extent we are not prepared to state; but, connected with that recommendation, they will propose several very important changes for the advantage of creditors. We hope soon to see their Third Report, and that their Fourth and last will not be delayed longer than can be unavoidably helped.

REVIEW.

The Laws relating to the Medical Profession; with an Account of the Rise and Progress of its various Orders. By J. W. Willcock, Esq., Barrister-at-Law. London: J. & W. T. Clarke. 1830.

We think this work is one of very general interest; and it has been ably and learnedly executed. The subject has the advantage of enlisting the attention in equal degree both of legal and medical men; and the author has rendered essential service to the numerous members of both professions.

It is certainly not a dry book of law; it is historical, scientific, antiquarian, literary, critical, philosophical, and legal. Contrary to the modern practice of the writers of treatises, who generally confine their labours to the present state of the law, Mr. Willcock has commenced his book with an investigation of the "Ancient Orders of the Medical Profession," and has not thought it beside his purpose to carry us back to the times of the bards and druids, the Romans and Saxons; and in the early periods to which he has had reference, he treats of the various orders of practitioners, including—besides the *regular* adepts, consisting of physicians, surgeons, and apothecaries — the large class of *empirics*, which he enumerates under the denominations of experimentalists, alchymists, astrologers, sorcerers, witches, Jews, pretenders, and ladies.

Those who are desirous to amass wealth as rapidly as possible, care little, of course, for any thing but practical knowledge; but we confess that we are attached to our profession for much more than its emoluments, and we incline to think that its duties are by no means worse discharged for some acquaintance with the origin of our laws, and the reasons and principles on which they are founded. We are aware that it is not wise to bestow a large portion of time upon the intellectual part of pro-

fessional subjects, and we would by no means do more than encourage a reasonable extent of philosophical enquiry. Within these bounds we think the present author has strictly confined himself.

We shall first make a few extracts from the introductory chapter, to which these remarks apply, and then proceed to those parts of the work which relate to the present state of the law.

"We possess few materials for a history of the medical profession anterior to the reign of Henry VIII. Science has little to regret the circumstance; nor is it probable that much amusement would be derived from the story of desolation and misery, involved in a detail of the attempts of ignorance to alleviate the sufferings of mankind.

"Some of the medicinal properties of herbs have been known in the most savage state of society, and applied as well for the cure of wounds as of other corporeal maladies. We are informed that the druids and their attendants cultivated the science of physic and surgery to this extent; and, to acquire the reputation of supernatural power, mingled incantations with their medicaments. We are told that their panacea was the misletoe, clipped from the oak on a certain mysterious night, when the moon, in a particular stage of her renewed existence, lighted on it a propitious beam, with a consecrated golden hook used by sacred hands, and received on a pure white and sanctified cloth, and afterwards treasured for many a day in the sanctuary of the woodland god. As every failure of the medical art was readily ascribed to some omission in these numerous ceremonies, or to some religious disqualification of the patient, the skill of the physician and the virtues of the misletoe were ever secure from imputation. We read also, in the pages of Tacitus, of the competition of the German dames with these venerable priests in the science of physic; and as they were believed to be endued with divine wisdom, and were naturally both more attentive in the choice of their medicines and to the comfort of their patients, it is highly probable that their reputation was by no means inferior to that of the regular physicians."

Mr. Willcock also observes that —

"The nations of southern Europe, and even the druids of the north, assigned a divinity to every sanatory herb ready to exert its benign influence in favour of weak mortality, and to counteract the malignity of the evil genii who presided over the poisonous and unwholesome. This superstition of the Britons was probably little affected by the residence of the Romans among them; and the Saxon tribes brought other legions of spirits as auxiliaries to the ancient mythology. Nor was it eradicated by the introduction of the Christian religion. It was modified only; the new faith converting the deities into demons, who were now supposed to exert a beneficent influence on the bodies of men to establish dominion over their souls. The gloomy fancy of the times representing necromancers and witches engaged in intercourse with these spirits, in the most monstrous and ridiculous forms.

"The first of the monkish practitioners, perhaps, blended with their medical applications a little learning, and all the other pretenders in physic mixed with theirs a great deal of superstition. Yet the monastery which produced a Bede can hardly be supposed to have been destitute of students in the medical science to the extent in which it might have been derived from the Latin authors; and on the institution of colleges, medicine necessarily become an object of considerable attention."

In the middle of the seventh century the Medical School at Salerno was founded; and our author infers from a passage in Domesday Book that the degree of Bachelor of Physic was known at Oxford soon after the Conquest. In the fourteenth century the degree of Doctor of Physic was by no means uncommon. The monks and other clergy were necessarily the only regular physicians and surgeons; and the practice having become very lucrative, they were induced to quit their monasteries and neglect their devotions. Hence the Council of Tours issued a canon restricting the time of absence; and subsequently the profession of surgery fell into the hands of the barbers and smiths who had formerly been the manual assistants of the more "learned leeches" in the less agreeable part of their occupation.

The barbers practising surgery formed one of the guilds or companies in London, and obtained a charter in the first year of Edward IV. A separate body of surgeons at length sprang up.

The grocers or poticaries, as they were indifferently designated, formed another company until the 13 James I., when they were divided into two corporations.

"The grocers having collected, for culinary purposes, wine, oils, acids, honey, pepper, lard, and a few kinds of herbs, added to the stock some ointments, and such herbs as were peculiarly applicable to medical purposes. The making of diet drinks was among their ordinary vocations. The village and even the city apothecary was a dealer in eatables and drinkables of all sorts. The itinerant quack was the only exclusive vender of medicine. Some who had stored up the prescriptions of the physicians, which they were bound to file as their vouchers, or the recipes of the good mothers in the neighbourhood, acquired a reputation for the knowledge of simples, and took upon them to doctor their customers. It was not until the introduction of chemical medicines, and too great a variety in the mixtures of the learned physicians had rendered the medical department of their trade unintelligible to the ordinary grocers, that the pharmacopolites appeared as a separate class, and claimed a superiority over the dealers in cheese, butter, and sugars."

The irregular practitioners whom we have enumerated, are next described by the author; and we extract the following as to the alchymists: —

"The statute against the pursuit of this science, supposed to have been founded on the policy of deterring the people from wasting their property in the fruitless search for gold, was indeed merely an act to secure to the king a monopoly in this expected treasure: for, rigorously as it was enforced against private persons, we find that our royal masters had established a great laboratory for the manufacture of gold, diamonds, and physic; and pressed into their service, in this employment, every one suspected of possessing the valuable secret. There are among our records several commissions, not merely indemnifying the alchymists against the pains of the statute, so that the king were supplied with the gold, but others which required all men to pursue and take the offenders wereever they could catch them, and to compel them to labour in the royal mint. In this appears the proud indemnity of science; the supposed secret not only protected its possessors from bodily injury, as that would have endangered the treasure, but it extorted from sovereignty a reluctant patronage, in the hope of a remuneration exceeding the wealth of nations."

The pretenders to effect cures by supernatural means were of various descriptions. The arch-sorcerer was the king.

"The second and only legal class of conjurors, comprising the king and the clergy, were those who, either resorting to the aid of nature and medicine in secret, or neglecting it altogether, engaged to restore their patients to health by means of fasting, praying, preaching, and the exhibition of ecclesiastical pageants.* The diseases of the imagination, by no means few, were easily cured by each of these sects; the diseases of the body only by the former."

After treating of the witches, Jews, and various pretenders of the healing art, the author concludes the historical part of his work with the following: —

"But it was not the low and vulgar class of witches or old women alone who took upon them to attend on the sick. In the age of chivalry, the high-born damsel deemed it an essential part of her education to acquire some proficiency in the art of healing. Nor does her attention appear to have been confined to the knowledge of the medicinal virtues of herbs. She was not only skilful in composing soothing drinks, and making ointments, but our ancient poets describe her as occupied in setting broken and dislocated limbs, and superintending the dressing of the wounds of her champion. The kindness and attention of such a surgeon would, at least, alleviate the mental sufferings of the knight; and probably her simple remedies were, with the aid of nature, the best regimen of the period."

The second chapter describes the "Present Orders of the Medical Profession;" and is divided into six sections. 1. Physicians; their practice, classes, College, licentiates, &c. 2. Surgeons; their practice, College, &c. 3. Apothecaries; their practice, classes, licentiates, examination, &c. 4. Chemists and Druggists. 5. Accoucheurs. 6. Persons administering medicine gratuitously.

"The law recognises only three orders of the medical profession: physicians, surgeons, and apothecaries. It tolerates, however, such persons as through charity, and without receiving any remuneration, minister to any outward sore, uncome, or apostumation, outward swelling or disease, any herbs, baths, poultices, or emplasters, according to their experience or knowledge; or drinks for the stone, strangury, or agues. Chemists and druggists also are noticed as persons who may make and vend medicines; and it may be difficult to show that they may not compound them according to the prescriptions of a physician, or the orders of an apothecary: but they cannot, in any case, prescribe physic of their own authority."

The third chapter treats of "Unqualified Practitioners in Medicine:" 1. in Physic; 2. in Surgery; and 3. as Apothecaries. The remarks of Mr. Willcock on this part of the subject are important, and possess additional value on account of some recent cases which have been brought before the public.

"Whatever may have been the origin of the various distinctions in the medical faculty, however inconvenient it may be to retain them, however inadequate to their purpose the present institutions may be by some persons considered, all must concur in deeming some examination necessary before men are allowed to enter upon the dangerous profession of administering medicine, and performing hazardous experiments upon the human frame; yet, either on account of the antiquity of the laws against the offence,

* "The Medical Rose offers us a peculiar and very approved remedy for the epilepsy. Advising the patient to stand upright, saying the Lord's Prayer with the mouth wide open, to prevent the first attack, and informing us that a lunatic, an epileptic, and a demoniac, were the same, he gives us the following sacrophysical directions: —'When the patient and his parents have fasted three days, let them conduct him to a church. If he be of a proper age, and in his right senses, let him confess. Then let him hear mass on Friday, during the fast of *quatuor temporum*, and also on Saturday. On Sunday let a good and religious priest read over his head in the church the Gospel which is read in September in the time of vintage, after the feast of the Holy Cross. After this, let the same priest write the same Gospel devoutly, and let the patient wear it about his neck, and he shall be cured. The Gospel is,—"This kind goeth not out by prayer and fasting."'—*Ros. Ang.* p. 78. ed. 1491. *Ib.* p. 415. ed. 1595."

or the difficulty in furnishing sufficient evidence, or the want of persons particularly appointed or interested in enforcing them, this kingdom is overrun with illegal pretenders in medicine, often as ignorant as its ancient professors—the artificers, smiths, barbers, astrologers, and witches.

"When the practice of a profession is of such a nature, that the conduct of the practitioners is before the eyes of the public, so that all men may be able to form a fair estimate of their comparative capacity, a preliminary examination may not produce any great public advantage, as the various talents and deficiencies of the competitors soon become known to those who may have occasion to select from among them. But, on the contrary, when the practice is secret, so that people have no opportunity of forming a general opinion on the competency of the practitioner; when, too, it requires a considerable portion of scientific knowledge in each individual who is to be separately subjected to his operations, to enable him to arrive at any reasonable conclusion as to the skill or ignorance of the professor; and particularly when it is of such a nature, that the incompetency of the practitioner is often attended with fatal, generally with irremediable, and always with most dangerous consequences; the fear of punishment for malpractice, and the liability to damages for ignorant or negligent practice, are by no means sufficient to indemnify the public, and to deter rash empirics, who, too ignorant to be conscious of their own incapacity, too avaricious to be restrained by compassion for their unfortunate patients, and confiding in that impunity with which they too often escape, through the difficulty of furnishing that direct and conclusive evidence which is necessary to bring them within the scope of the law, may sacrifice the lives and impair the constitutions of thousands before their ignorance and rashness are detected.

"The statute law is perhaps deficient in not having provided an adequate punishment in these cases. The more ancient writers on the common law seem to have regarded such practice either as justifiable or criminal, according to the result; and the more modern writers have either too readily followed, or too generally condemned, these authorities, without a sufficient consideration of the changes which have taken place in the state of the profession."

The fourth chapter relates to "Malpractice in Medicine;" its various kinds, and the punishment attending it; first, by the law in general, and next by the authority of the Colleges of Physicians and Surgeons, and the Apothecaries' Company. The malpractice under consideration is defined to be of four kinds:—

"Wilful malpractice, or that which has for its object the destruction or injury of the patient, or of a child of which a woman is pregnant.

"Avaricious malpractice, or that which has for its object the gain of the practitioner, by adopting intentionally improper modes of treatment, or substituting less valuable medicines or impure drugs for those which are more appropriate, or by any other means through which the health of the patient may be sacrificed to the lucre of the practitioner.

"Negligent malpractice, in which there is no criminal or dishonest object, but a gross neglect of that attention which the case of the patient requires.

"Ignorant malpractice, in which there is no object, criminal or dishonest, immediately towards the particular patient, but a gross violation of that duty which every man owes to the public, in undertaking, for the sake of gain, that cure which he wants the ordinary professional skill to conduct according to the known rules of able physicians or surgeons, or in undertaking to compound medicines without a due knowledge of their names, nature, qualities, or quantities."

The civil Responsibility of Medical Practitioners is the subject of the fifth chapter; comprising want of skill or attention, and experiments in medicine and surgery.

"By experiments we are not to be understood as speaking of the wild and dangerous practices of rash and ignorant practitioners, which fall properly under the head of want of skill and knowledge; but of the deliberate acts of men of considerable knowledge and undoubted talent, differing from those prescribed by the ordinary rules of practice, but which they have good reason, from a knowledge of the human system and of the particular disease,—and if the experiment be medical, of the nature of the medicine,—to believe will be attended with benefit to the patient, although the novelty of the undertaking does not leave the result altogether free from doubt.

"When an experiment of this kind is performed with the consent of the party subjected to it, after he has been informed that it is an experiment, the practitioner is answerable neither in damages to the individual, nor on a criminal proceeding; although the result be contrary to expectation, and attended with an injury which has not generally attended the ordinary mode of practice. But if the practitioner performs his experiment without giving such information to, and obtaining the consent of, his patient, he is liable to compensate in damages any injury which may arise from his adopting a new mode of treatment."

In the sixth chapter the Remuneration of Physicians, Surgeons, and Apothecaries, is discussed and investigated. The author observes—

"Every regular practitioner is entitled to a fair remuneration for his services to his patients, according to his situation in life, and the expense and exertion by which he has rendered himself competent to his profession. And a medical man of great eminence may be considered reasonably entitled to a larger recompence than one who has not equal practice, after it has become publicly understood that he expects a larger fee; inasmuch as the party applying to him must be taken to have employed him with a knowledge of this circumstance."

The seventh relates to the Protection of

Medical Men: 1. their character; and 2. their writings, lectures, &c., and the copyright therein.

Their Privileges form the contents of the eighth chapter: 1. in respect of insane persons; 2. their employment; 3. 4. and 5. exemptions as jurors, from serving offices, and bearing arms.

The ninth relates to Contagious Diseases, and the liability of medical men for any act or neglect which has extended the infection.

The tenth chapter applies to Dissection, and obtaining bodies for that purpose.

The other parts of the work consist of the several statutes, charters, patents, by-laws, and cases, relating to the three classes of the medical profession; and which are appropriately arranged under their different departments.

From these portions of the book we make the following selections, which perhaps may be interesting to our readers. The first is a "Draught of Act of Parliament. 9 H. 5." extracted from Petyt's MSS., vol. xxxiii. p. 140.

"No one shall use the mysterie of fysyk, unless he hath studied it in some university, and is at least a bachelor in that science. — The sheriff shall enquire whether any one practises in his county contrary to this regulation; and if any one so practise, he shall forfeit 40*l.* and be imprisoned. And any woman who shall practise physic, shall incur the same penalty.

"It is ordered in parliament, on this petition, That the Lords of the Privy Council shall make what regulations they shall think proper.

"But it does not appear that this had the effect of an act of parliament."

The next is a canon of the Council of Lateran, requiring physicians to call in priests.

"For as much as the soul is far more precious than the body, we do prohibit, under the pain of anathema, that no physican (*medicus*), for the health of the body, shall prescribe (*sudeat*) to a sick person any thing which may prove perilous to the soul. But when it happeneth that he is called to a sick person, he shall first of all effectually persuade them to send for the physicians of the soul; that after the sick person hath taken care for his spiritual medicament, he may with better effect proceed to the cure of his body. And the transgressors of this constitution shall not escape the punishment appointed by the council (which prohibits their entering the church until they have made satisfaction)."

The charter granted to the College of Physicians by Queen Elizabeth, in 1565, allows four bodies of felons executed within sixteen miles of London. It is in the following terms: —

"That they might have, annually, when the president should think fit, either at one time or at several times, one, two, three, or four bodies of felons executed in Middlesex, or in or within 16 miles of London, without hindrance by the king, or his sheriffs, bailiffs, or others. And that the president or the persons, professors of or experienced in medicine, appointed by the college, might, observing all decent respect for human flesh, dissect the same, without making any pecuniary compensation, provided that they should, afterwards, at their own expense, bury such bodies."

A considerable portion of the book is occupied with the cases decided regarding the rights and liabilities of medical men, into which of course we do not enter; and in conclusion, we feel it due to Mr. Willcock to say, that in his pages will be found all that is essential to the medical practitioner to know of law, and all that the lawyer should be familiarly acquainted with of the sciences of anatomy and medicine.

HINTS TO PRACTITIONERS.

No. III.

RELATIVE TO BUSINESS — LISTS, ENTRIES, DAILY ARRANGEMENTS, &c.

A SOLICITOR, whether his business be confined or extensive, should keep a list of all the business in his office, classing the several departments (if there be many of each class) under the heads of, 1. Conveyancing. 2. Common Law. 3. Chancery. 4. Bankruptcy. 5. Miscellaneous. This list should contain the names of the client, and the party connected with or opposed to him, and the nature of the business. It should contain entries from time to time of the steps taken in each business, so that the solicitor and his clerks may be able to see the business in hand, the precise state of it, and whether it be in progress or not; and if not, to put it in motion. A constant reference and examination of this list by the solicitor and his articled and other clerks, should take place, particularly the business of Common Law, Chancery, and Bankruptcy. Upon an examination of these lists by the solicitor and his clerks (which cannot be too earnestly impressed on them), they will be able to give directions, and act from time in such matters as are necessary to be attended to.

These directions and matters should be noted daily in a log book or memorandum book, always open to view. An arrangement of the business to be done daily, and the order in which it should be done in the course of the day, ought to be made the preceding night or early in the morning; for without such arrangement and order, confusion must necessarily arise, and nothing can be done satisfactorily.

At the close of each day, or before the business commences the following morning, the solicitor and his articled and other clerks should make full and complete entries of his charges for the business done and of the disbursements made. This will not only keep alive in the memory the business actually done, but will lead the attention to such further business, or proceeding in business, as ought to be attended to and done; and for this purpose the entries previously made should be reviewed. But further, the charges will be then clear and intelligible, because the recollection is perfect and strong: but if delayed they will cease to be so; for the variety of matters which will occur necessarily tends to draw out those of an earlier date.

ARRANGEMENT OF PAPERS, DEEDS, &c.

Great confusion will arise if papers are suffered to be intermixed, and much time will be lost in looking for them. To avoid this evil, all papers relating to business in progress should be so distinctly arranged, that they may be easily referred to, and the bundle in which the papers are kept together should have no papers in it without being indorsed, and in its proper place. The best mode of keeping such papers well arranged, is to put them into places or bundles according to the vowel, that is to say, let each bundle or place have a *vowel* attached to it, and let the first vowel in the name of the party to whom the papers belong determine in which bundle or place the papers should be put. Thus, suppose a bundle or place under the vowel A.; the papers belonging to Mr. Barker should be placed there, because the first vowel in Mr. Barker's name is *a*.

At the end of the year all papers which are done with should be put away in bundles, numbered. The contents of each bundle should be entered in a *register book*, with the number placed opposite to the contents. The same book should contain an alphabet, in which the names attached to any paper in the bundle should be entered alphabetically, and the number of the bundle should be placed opposite to the name. Thus there will be a double reference to the papers; first, to the contents of each bundle, and secondly, to each person's name in the alphabet. Whatever names are upon the papers should be entered both ways in the alphabet, as Jones against Lloyd, and Lloyd against Jones; by which means, if the name of one be forgotten, the other name will be found.

A list of *deeds* and securities should be kept in a deed or security book, and entries made of them, and of the time when received and when delivered back; and receipts should be taken for them when delivered back; for, frequently, clients do not scruple, in order to avoid trouble to themselves, to fasten upon the solicitor the possession of papers, although he may have delivered them back. If no receipt can be taken, or if the deeds and papers are sent back, they should be accompanied by a letter, and the party delivering the letter and deeds or securities should be sure to make an entry of such delivery.

This leads to the consideration of a *letter book*, which should always be kept in an office, in which all the letters should be copied, and to which the clerk putting the letter into the post or delivering it should put his initials, to denote the delivery, and render it capable of proof when occasion shall require it.

This also leads to the propriety of making upon the back of every paper a notice or memorandum of any copy being delivered, by whom and to whom, so as to be capable of proof in case of need.

If a solicitor, or any articled or other clerk, should keep his papers so as to be mixed and confused, it will be generally found that such solicitor or clerk is himself in a state of confusion, and that all his ideas are mingled together, and that he has not clear and distinct perceptions, and that much of his business is forgotten, neglected, or improperly conducted.

PRACTICAL POINTS OF GENERAL INTEREST.

No. V.

BATHING.

No person has a right to bathe near inhabited houses, from which he may be distinctly seen, although the houses have been recently erected, and until they had been erected it had been usual for persons to bathe in great numbers at the place in question.

Macdonald C. B. has ruled, that whatever place becomes the habitation of civilised man, there the laws of decency must be enforced. *Rex* v. *Crundan*, 2 Camp. 89.

There is no common law right to bathe in the sea, and to pass over the sea-shore for that purpose on foot with horses and carriages. This was decided in the case of *Blundell* v. *Catterall*, 5 B. & A. 268.; the judgment in which is well worth perusal, being full of curious learning.

DISPUTED DECISIONS.

No. V.

TENANT FROM YEAR TO YEAR—RENT.

I THINK a few words may be said on the case, *Brown* v. *Chandler* (reported in No. XXXIV., *antè*, p. 106.), which was an appeal from a decree of the Master of the Rolls.

I have not seen any report of the case before the Master of the Rolls, but I submit that his Honour was right in decreeing for the respondent. The act 11 Geo. 2. c. 19. § 15. provides for cases of the death of tenants for life between two days of payment of rent, and enacts, that in all such cases the executors, &c. shall recover a proportionate part up to the day of the death of tenants for life.

The "usual rule," which the Lord Chancellor mentions, is, I presume, the common law, by which we know there could be no division of the rent; but I imagine, that by that law the remainder-man was not entitled to the rent accruing before the death of tenants for life; for it did not accrue in his time (Amb. 189.): the rent would therefore be lost, which is precisely what the 15th sect. of 11 Geo. 2. c. 19. was enacted to remedy. See *Jenner* v. *Morgan*, 1 P. Will. 392. pl. 105.

I do not conceive that the fact of a receiver being appointed affected the case or the law upon it.

F. A.

*** The statute 11 Geo. 2. c. 19. only extends to cases where the lease determines with the life of the tenant for life. See the words of § 15. The leases from year to year, in the case of *Brown* v. *Chandler*, were probably not made by the tenant for life, but were prior to her estate. It has always been considered a doubtful point, whether the statute applied to this case, and the Lord Chancellor has decided that it does not. Our correspondent is correct in supposing, that before the statute the rent for the fractional period was irrecoverable. See *Cline*'s case, 10 Co. 127., *Jenner* v. *Morgan*, 1 Plow. 392., *Pilkington* v. *Dalton*, Cro. Eliz. 575. 8 Ves. 311.

READMISSION OF ATTORNEYS.

(Continued.)

To the Editor of the Legal Observer.

SIR,

YOUR correspondent, J. W., in his letter contained in No. 39. p. 183., seems to be "impressed with the idea" that opinion is argument, and that the clearest possible demonstration is the *petitio principii*. For, what does his letter consist of? First, a declaration of his *opinion*, that "neglect," in the statute, means, not merely *culpable* omission, but *failure by any means*; next, a statement of the practice which has prevailed, founded on a similar construction of the word, *the correctness of which is the root of the question*; and, lastly, an assertion, that *because* Mr. Justice Taunton's decision was in conformity with preceding decisions, it "must *therefore* be correct."

I am aware that many cases may be cited in support of the learned Judge's decision; and of course in disputing that, I impeached the authority of all that were like it. I contend that neglect means "*culpable omission*;" I have the authority of the Court of King's Bench, in the two recent cases that I cited, for assigning to the word that meaning; I submit that an attorney who does not practise, is not *culpable* for omitting to take out a certificate: and the conclusion I draw from these premises is, that the failure to obtain a certificate by an attorney not in practice, is not a neglect within the meaning of the statute; that, consequently, it does not produce the disabilities imposed by it; and that, therefore, there can be no necessity for readmission, nor any liability to a fine.

But not to rely too much on *reasoning*, I am supported, to a great extent, by the *authority* of the very cases that J. W. alludes to; for, even in them, it has been held, that if the attorney has not *practised*, he shall pay no *fine* nor *arrears of duty*. Now, from the 31st section of the act, which provides, that the Courts may readmit the party *on payment* of all arrears of duty, and such penalty as they shall order, it is clear that they have no power to dispense with the arrears, *if incurred*; but the Courts have uniformly held, that *no duty is payable while the attorney is out of practice*. Does it not follow, that where the party is exempt from duty and fine, he is equally so from the penalty of incapacity; or, in other words, that the section does not apply to any case in which the party has not *practised* while uncertificated.

I may be deemed presumptuous in disputing the authority of so many cases, but I cannot help thinking that *mere authority*, however high, should not be allowed to prevent the enquirer after truth from pursuing a rational course of investigation: and when I see the decisions of the Judges not only at variance with the plain words of the act, but also inconsistent with each other, I may be pardoned for supposing the possibility that some of them are wrong.

I cannot refrain from adding, that, neither by the bar nor the bench, have the words of the statute, in any reported case, been analysed with that care and attention which their importance required; and that the effect of the whole current of decisions is, to keep the attorneys in a state of greater subjection and dependence than the legislature appears to have designed. I say not that this has been intentional; but only mention it as a fact, which is, perhaps, not unworthy of notice.

I remain, Sir,
Yours respectfully,
R. J. E.

CERTIFICATED CONVEYANCERS.

To the Editor of the Legal Observer.

SIR,

YOUR correspondent, "A Friend to Consistency," does not seem to be aware that the Societies of the Inns of Court did, at a parliament held the 13th of May, 1825, make an order calculated to remedy the abuse complained of by him. By that order it appears that the party applying for admission must sign a declaration that he really and truly intends *keeping terms for the bar*, and that he will not *directly or indirectly take out his certificate to practise* until he shall have kept twelve terms; that the student shall not be engaged in any trade, business, or occupation, or in any other profession except that of the law; and that if he take out his certificate until he has kept the twelve terms, he shall be expelled from the society, and a minute of such expulsion shall be transmitted to the Stamp Office. That if (having kept such terms) the student is desirous of practising as a conveyancer, he can only do so by permission of the benchers, and the application for such a purpose must be made annually. By this regulation, which is rigidly observed, your correspondent may observe that the description of persons now admitted members of the society are very different from those whom he imagined.

I should not omit to state, that the student on his admission deposits 100*l*., and that he receives no interest on it, but that it is returned to him on his call to the bar. As a proof of the strictness with which the benchers observe these rules, I can assure your correspondent that a gentleman who had served his articles with a solicitor, but who had not been admitted, applied for permission to take out his certificate after he had kept *six* terms; and that, although the testimonial of a most distinguished conveyancer as to the capability of the applicant accompanied the application, the honourable benchers refused to relax their order.

S. O.

*** Is our correspondent aware whether the same regulations prevail in *all* the Inns of Court? We believe the above order is confined to Lincoln's Inn.

Having noticed in your Journal, vol. ii. p. 185., a well applied article, under the title of "Certificated Conveyancers," I beg leave to offer a few remarks thereon; and in so doing, however highly I may commend the benchers of the inns of court for the introduction of fit and proper rules to be observed by persons qualifying to act as conveyancers in future, still I cannot help expressing my great surprise, that in so doing they have overlooked the greatest of all evils, *the past*; whereby those persons whom your correspondent very justly complains of, have by too easy means gained a footing, and still retain it, under the sanction and authority, but to the disgrace of, the societies to whom they claim connection: and who, I presume, have the power in their own hands of easily remedying the evil, by adopting *retrospective* as well as *prospective* measures; and who, I submit, ought not only for the respectability of their several societies, and for the benefit of properly qualified members, but also for the good of the public at large, call upon every person practising as a certificated conveyancer to duly qualify under the new regulations, although, taking all the circumstances into consideration, they perhaps ought to have the benefit of practising during such qualifying period.

Now, Sir, I have great pleasure in stating that the present qualification, (which commenced, I think, in Easter Term, 1828.) is precisely the same in every respect, and with the ultimate intention in every case, of the person being called to the bar; therefore, the qualification being complete, it is merely a case of election with every member, whether he will act as a conveyancer, or be called to the bar. In fact, the rules regarding the future certificated conveyancer are more rigid than those required on being called to the bar.

I do hope, therefore, Mr. Editor, that the benchers of the several inns of court will make some very strict enquiries and beneficial alterations with respect to the present malpractitioners; and if they go to the extent they have with the present qualifying members, they will not only be adding to the respectability of the profession in general, but to the great benefit of society at large. With every apology for this intrusion,

I am, Sir,

Your well-wisher,

A REGULAR SUBSCRIBER.

NOTES OF THE WEEK.

PROCEEDINGS IN PARLIAMENT RELATING TO THE LAW.

Mr. *Crampton* — Bill to improve the administration of justice in Ireland.

Mr. *Hobhouse* — Bill for the regulation of vestries.

Mr. *O'Connell* — Bill to enable defendants in prosecutions for libel to give in evidence the truth of the allegations in the alleged libel, in order to negative criminal intent.

Mr. *O'Connell* — Bill to amend 6 Geo. 4. c. 51., special juries and indictments (Ireland).

Mr. *James Gordon* — Motion on blasphemous and seditious libels.

Mr. *O'Connell* — Bill to repeal the subletting act in Ireland.

Mr. *Harvey* — To move for returns explanatory of the present state of the charity funds of the country, with a view to their more efficient appropriation.

NEW KING'S COUNSEL.

On Wednesday last Mr. Butler was made a King's Counsel. His varied talents and his eminence as a conveyancer well deserve this distinction.

"EXCLUSIVE" INFORMATION.

We are not at all anxious to confine the information we obtain to our own channel of communication with the public. We have been able, notwithstanding the disadvantages of a weekly publication, to lay before our readers the earliest intelligence of most of the legal changes and appointments which have been made since our first publication. These are frequently quoted by the press, but generally with an acknowledgment of the source from which they are derived; and to this we have no possible objection. We are surprised, therefore, to see that a quarterly contemporary composes the whole of an article, entitled "The Events of the Quarter," from our pages, without making any acknowledgment. We are unwilling to impute want of candour to this publication, and hope, therefore, that this hint will be sufficient. Furthermore, if our contemporary must take our sentences, and use them for his own ends, we beseech him not to serve them, after the manner of Sir Fretful, "as gypsies do the children they steal—disfigure them to make them pass for his own."

SUPERIOR COURTS.

COURT OF KING'S BENCH.

SETTLEMENT OF HIRING AND SERVICE — APPRENTICESHIP.

Where a pauper agreed for a year to learn sawing, and he was to have 7s. 6d. out of every 20s. he earned, and served a year, and made a similar agreement for the next year, except that he was to have 8s. out of every 20s. he earned, and served a year: Holden, that he gained no settlement.

The pauper had been removed from ——— to Crediton, which appealed and tried to show a settlement gained in St. Edmond's. The pauper agreed for a year with West to learn sawing, and he was to have 7s. 6d. out of every 20s. earned by him: nothing was said about *Sundays*. At the end of the year a second agreement was made like the first, except that the pauper was to have 8s. out of every 20s. earned by him. The sessions considered this not to be a settlement by hiring and service, and stated a case.

Crowder, in support of order of sessions. If there appears to be any thing to warrant the finding of the sessions, the Courts will not interfere. [*Littledale* J. Let us hear the other side.]

Praed contrà. All the cases cited differ from the present, inasmuch as the intention to contract the relation of master and apprentice was to be found in all of them. In *Rex* v. *Mountsorel*, 2 M. & S. 460., *Rex* v. *St Margaret's, King's Lynn*, 6 B. & C. 97., an apprenticeship was contemplated; and in *Rex* v. *Tipton*, 9 B. & C. 888., at all events the second agreement was a good hiring and service.

Littledale J. The sessions have decided right. This case is the same as *Rex* v. *Bilborough*, 1 B. & A. 115.* In *Rex* v. *Hitcham*, Burr, S. C. 498., the pauper was to do all his brother's lawful business in the farming way, besides learning the trade of a carpenter; this makes the difference between the two cases. I can see no difference between the agreement for the first and that for the second year, except the reservation of 8s. instead of 7s. 6d.

Parke J. This case is similar to *Rex* v. *Bilborough*. There was no contract of hiring and service; the pauper was only to learn the business of sawing: the second agreement is the same.

Taunton J. This is a defective contract of apprenticeship. The second agreement was the same: the pauper was only to learn sawing. The distinction between contracts of hiring and service and apprenticeship is this: — Where the master is to teach and the pauper to learn, and it appears that the pauper is to do all the master's work; this will not prevent the contract being considered a good hiring and service.

Lord *Tenterden* C. J. But where the agreement is only to teach on the one part and to learn on the other, it is a defective contract of apprenticeship.

Order confirmed.

MANDAMUS — SELECT VESTRY. — 59 GEO. 3. c. 12.

To a mandamus *directed to the overseers and churchwardens of a parish, commanding them to call a meeting of the parishioners to consider the propriety of appointing a select vestry, according to the provisions of 59 Geo. 3. c. 12., a return that the rector, two churchwardens, and certain parishioners, executed the duties imposed by the 59 Geo. 3. c. 12. from time immemorial, is bad.*

A *mandamus* had issued to the overseers and churchwardens of St. Bartholomew the Great, to call a meeting of the parishioners, to consider the propriety of appointing a select vestry according to the provisions of 59 Geo. 3. c. 12. To this *mandamus* the defendants made the following return;—That the parish of St. Bartholomew the Great is and hath been an ancient parish; that a laudable and approved custom hath existed from time immemorial in the said parish, that the rector, and two churchwardens, and other parishioners who had served the office of churchwarden, &c. should be a select vestry, and had always acted as such, to the exclusion of the other parishioners, in all parish matters and concerns of the poor; that the duties imposed by 59 Geo. 3. c. 12. have been executed immemorially, and still are, by the said select vestry within the said parish, &c., by reason whereof

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* That case was, "where, by a parol contract, the master agreed to teach the pauper to make stockings, during the year, for which he was to receive two guineas, and the pauper was to have his earnings, paying his master for the use of the frame, &c., and the pauper continued in the service a year and a half; it was holden, that the pauper did not gain a settlement by hiring and service." See also *Rex* v. *Eccleston*, 2 East, 298.; *Rex* v. *Burbach*, 1 M. & S. 370.

the said defendants could not obey the said writ of *mandamus*.

Prendergast, in support of the *mandamus*, contended that the return was bad. In order to prove this a valid custom, the defendants must show that they raised funds for the poor before 43 Eliz. By their return they acknowledge that the overseers are excluded from the management of the poor, and claim by custom a power of acting, in all matters relating to the poor, without the interference of the overseers, who by the 43 Eliz. are authorised to manage the concerns of the poor; and who, by 59 Geo. 3. c. 12., must be a constituent part of a select vestry. This custom is too large, and anticipates the 43 Eliz. by some centuries. He cited *Rex* v. *Woodman*, 4 Barn. & A. 507., and the decision of *Abbott* C. J. there.

Platt contrà. The 43 Eliz. did not first regulate the management of the poor. The overseers are omitted in the return, because this custom is stated to have existed long before 43 Eliz., when there were no overseers. The *obiter dicta* of Judges ought not to be too highly estimated. The legislature contemplated the existence of a select vestry similar to this stated in the return, as appears by the proviso in the 36th section of 59 Geo. 3. c. 12.; and it is absurd to suppose that two select vestries could exist and act in the same parish at the same time.

Prendergast in reply. A compulsory rate was first established by 43 Eliz. This vestry, as appears by their return, must have done all that was first authorised by that statute. The return is made by the churchwardens and overseers of the parish, which were therefore appointed overseers pursuant to the statute of Elizabeth, and which must be bound also by 59 Geo. 3. c. 12.

Littledale J. The custom is not stated in the usual way; as it is not said, that by right they may act as a select vestry; but that is not very material. It is very possible, that this select vestry may have regulated the concerns of the poor previous to the 43 Eliz., and I do not say that a statute may not be grafted on a custom. But it is impossible that this vestry can have executed the duties imposed by 59 Geo. 3. c. 12. It cannot have enquired into and administered the money collected for the poor-rates. By that statute the overseers are required to conform to the directions of the select vestry. They cannot have appointed an overseer or assistant overseer from time immemorial.

Parke J. The 36th section of 59 Geo. 3. c. 12. was introduced *ex abundanti cautelâ*. The parish have a right to have a select vestry now existing, which can execute the duties imposed by 59 Geo. 3. c. 12., which it very clearly cannot do. This return is insufficient, and our decision agrees with the opinion of Lord *Tenterden* expressed in *Rex* v. *Woodman*, 4 Barn. & A. 509.

Taunton J. I am of the same opinion. Some part of the return is in the very words of the 59 Geo. 3. c. 12., but no blame is imputed to the persons who prepared this return. There could not have been a vestry answering all the purposes of 59 Geo. 3. c. 12. acting in the parish from time immemorial. The 36th section of that statute makes no difference. I do not see why the ancient select vestry may not act concurrently with one appointed under 59 Geo. 3. c. 12.; they may still continue to act in matters relating to the church rate, and over which the churchwardens have no jurisdiction.

Peremptory *mandamus*. — *Rex* v. *Churchwardens and Overseers of St. Bartholomew the Great*. T. T. May 28. 1831.

EVIDENCE — HUSBAND AND WIFE — LETTERS OF ADMINISTRATION — MARRIAGE — WITNESS'S COMPETENCY.

Where a man has married again, during the lifetime of his wife, she is competent to prove her marriage with him, when she does not contradict her husband with respect to it.

Semble: The fact of her statement being contradictory to that of her husband is of no consequence.

The certificate of ordination, more than thirty years old, of a deceased clergyman, if produced from the proper custody, and signed by the person ordaining, is admissible in evidence to show the alleged clergyman to have been ordained, without proof of the signature.

As the certificate of ordination is not the act of any Court, no seal is required.

Removal from Bathwick to the parish of St. Pancras. Upon appeal, the sessions quashed the order, subject to the opinion of the Court on the following case: — The respondents proved, by the evidence of the pauper, a settlement in the parish of St. Pancras, and his marriage at Bath. The appellants insisted that this marriage was void, on the ground of a former marriage. It appeared, by the evidence of the alleged first wife, that she, being a Roman Catholic, and the pauper a Protestant, had, while they were resident in *Ireland*, gone to the house of a Mr. Wood, who was understood to be a clergyman of the church of *Ireland*; and that in his house he had asked the pauper if he was willing to take the woman as his wife, and the woman if she would take the man as her husband. To this they respectively gave their assent; after which they returned to the house of the pauper's father, and cohabited together for some months. To prove the fact of Mr. Wood having been a clergyman of the Established Church, his widow was called, who stated that he acted as a clergyman; and produced letters of orders, which, she said, had been found among his papers, signed by the Archbishop of Tuam, and having a seal; but no evidence was given of the signature of the Archbishop, nor of the seal. The letters of orders were more than thirty years old.

Jeremy and *Erle*, in support of the order of sessions, contended that this was a valid marriage within the principle laid down by Lord Stowell in *Dalrymple* v. *Dalrymple*, 2 Hag. Rep. 54.; and the decision in *Collins* v. ——, 2 Salk. 437.; and *Wigmore's case*, ib. 438., as to a contract *per verba de præsenti*. In a recent case, too — *Smith* v. *Manwell*, R. & M. 80. — *Best* C. J. had ruled, that a marriage in *Ireland*, performed by a clergyman of the Church of *England*, in a private house, was valid; and said, "that the case of *Dalrymple* v. *Dalrymple* had placed it beyond a

doubt that a marriage so celebrated would have been valid in this country before the Marriage Act: and when he found that this marriage had been performed by a gentleman who had officiated as the curate of the parish for eighteen years, he must presume it to have been performed according to the laws of that country; and he should not put the defendant to the production of a licence, or to any further proof." As to Wood having been a clergyman, that was sufficiently proved by the evidence of his widow, who proved that he was a Protestant clergyman, and that the letters of orders were found among his papers after his death. With respect to the competency of the pauper's wife as a witness to prove the first marriage, the case of *Rex* v. *All Saints, Worcester*, 6 M. & S. 194., is decisive. It was there held (on a question of settlement, the pauper having been removed to her maiden settlement), that where the respondent called *A.* to prove her marriage with *C.*, in order to get rid of the subsequent marriage of *C.* with the pauper, *A.* was a competent witness; for *C.* not having been called as a witness, *A.* did not contradict him, and her evidence could not be used to criminate him. As to the third point, that the letters of orders were improperly received in evidence by the sessions, it was unnecessary to have put them in at all; for the evidence of Wood's widow was sufficient to prove that he was a clergyman. But they were properly received, without being proved; for, by analogy to the case of letters of administration, they were receivable without strict proof. In Philipps on Evidence, i. 385—397., it is laid down, that the seal of the Ecclesiastical Court on the exemplification of a will, is admitted without proof. This was the seal of an individual, and not a public seal; and being thirty years old, it is like the case of a warrant of attorney or letter of administration.

Littledale J. There is no proof of Wood's ever having acted as a clergyman except in this instance.

Erle. It is stated in the case, that they went to a priest of the Church of *Ireland*, to one who was said to be a Protestant clergyman; but, independent of his being a clergyman, it was a valid marriage, *per verbâ de præsenti*, and there were words of mutual acceptance sufficient to make it such, as held by Lord Stowell in *Steadman* v. *Powell*, 1 Addams' Rep. 58.

Rogers contrà, admitted that *Ireland* was circumstanced similarly to *England* before the Marriage act, and regulated by the canon law; but, to make any marriage valid it must have been solemnised by a priest. *Rex* v. *Brampton*, 10 East, 282., where a marriage *per verba de præsenti* was holden valid. If they had relied on reputation alone, and the sessions had come to a conclusion on that part, it cannot be disputed that it would have been competent for them to have done so; but the Court will look at the whole of the evidence, and, if any were perceived which should have been rejected, as they cannot say what influence that particular evidence might have had upon the decision, they will reject the whole. As to the letters of order, if the seal were a seal of office, it should have been proved. *Chadwick* v. *Bunning*, R. & M. 306.

Lord *Tenterden* C. J. Need there be any seal? I cannot find the necessity of it at all.

Littledale J. In Gibson's Codex, it is said that ordination is by word of mouth.

Rogers. This having been by the Archbishop, in his corporate capacity, the seal was necessary; which would not have been necessary had he acted in his individual character. *Morser* v. *Thornton*, 8 T. R. 303. As to the admissibility of the wife as a witness, this case is distinguishable from *Rex* v. *All Saints, Worcester*; for, in that case, the husband was not examined. 2 Hale's, P. C. 301., 1 Phil. Evid. 80. *Barker* v. *Dixie*, Rep. temp. Hardw. 264. *Davis* v. *Dinwoody*, 4 T. Rep. 678. *Rex* v. *Cliviger*, 2 T. R. 263. That rule would not apply to the leases by corporations. *Cur. adv. vult.*

Lord *Tenterden* C. J. pronounced the judgment of the Court. The two questions in this case are, 1st, Whether the wife of the pauper was a competent witness to prove the first marriage; 2d, Whether the letters of ordination of the clergyman Wood were admissible. We are of opinion, as to the first, that, assuming her to be the wife, her evidence was admissible. We will not say, that, if the husband had been called and examined to that particular point, she would not have been admissible to contradict him. But she did not contradict any thing which her husband had said. The case of *Rex* v. *Cliviger*, 2 T. R. 263., was materially shaken by *Rex* v. *All Saints, Worcester*, 6 M. & S. 194. Lord *Ellenborough* there said, "that the wife contradicted no denial then in evidence of the existence of the marriage; nor do I say that it would make any material difference if she had." In this case, how would her evidence criminate him? On a direct charge it would do so, but this is not a direct charge against the husband; neither has it an immediate tendency to criminate him, as what she stated could not be used in evidence against him hereafter on an indictment. We are also of opinion, that the certificate of ordination was admissible in evidence. It came from the proper custody, and was dated more than thirty years back. If it had been signed only, there would have been no question. It is therefore unnecessary for us to decide whether the seal, which is more than thirty years old, should have been proved; for the certificate of ordination is not the act of any Court, and the seal was not required.

Order of sessions confirmed.—*Rex* v. *Bathwick*. T. T. June 6. 1831.

LIBEL — INDICTMENT — INNUENDO.

In an indictment for libel, where the meaning of the words is clearly intelligible, innuendoes are unnecessary.

Lord *Tenterden* pronounced the judgment of the Court in this case, which had been argued in a writ of error to the indictment. The defendant had been convicted of publishing libels signed "Swing" in the county of Suffolk. If there is any count in the indictment which will support the judgment that is sufficient. Now, the fifth count is sufficient to support the judgment; and it is therefore unnecessary for the

Court to give any opinion as to the other counts. This count alleges that the defendant published an inflammatory libel calculated to produce a disturbance of the public peace, and the words there set out were, "Oh, ye parsons and farmers! unless you pay us better for our labour, we will put you in bodily fear." It had been objected, that here there had been no introductory words nor innuendoes. But it is a general rule, that where words are perfectly intelligible in themselves, neither introduction nor innuendo is required. Here the passage is perfectly intelligible in itself; and it was obviously calculated to cause a disturbance of the peace. The threat was clearly an offence, and it was as clearly calculated to cause a disturbance of the public peace.

Judgment for the Crown. — *Rex* v. *Saville.* E. T. May, 1831.

HUSBAND AND WIFE — ECCLESIASTICAL COURT — DEPOSITIONS.

Depositions taken in a suit for alimony in an Ecclesiastical Court, are not admissible evidence in answer to an action for necessaries supplied to the wife.

In an action brought by a coal-merchant against the defendant, Mr. Carmichael Smith, to recover the price of a chaldron of coals furnished to the defendant's wife, tried at Guildhall, the plaintiff had a verdict. The defendant, who conducted his own defence in person, obtained a rule to show cause why the verdict should not be set aside, and a new trial had, on the grounds that the Judge had refused to admit in evidence certain depositions taken in the Ecclesiastical Court. The object of the defendant, in offering these depositions in proof, was to show that he had made an allowance to his wife under the authority of the Ecclesiastical Court, which discharged his liability from necessaries supplied to his wife, who lived separate from him; and also to show that a witness, on whose evidence the plaintiff's case mainly rested, had sworn differently in the Ecclesiastical Court. On cause being shown against the rule,

The *Court* was of opinion that the Judge had done right in refusing to admit the depositions; and it was observed, that the defendant had not laid the ground for the admission of the depositions as to the witness, as he had not put the question to the witness, whether he had not sworn differently in the Ecclesiastical Court. This would have been done by counsel; or if not done, the defendant must suffer for it; and he could not be allowed to stand in a different situation merely because he chose to conduct his own defence.

Rule discharged. — *Houghton* v. *Smith.* E. T. May, 1831.

BASTARD — SETTLEMENT BY BIRTH — ORDER OF REMOVAL PENDING.

Where a bastard is born in a particular parish, from which its mother has been removed, and to which she has returned without the knowledge of the removing parish, it is settled where born.

Order of removal of a bastard child from Halifax to Manchester. The sessions quashed the order, and stated a case. The mother of the pauper had been removed from Halifax to Manchester, and then went back to Halifax without the knowledge of the parish of Manchester, and was there delivered of a bastard child.

Littledale J. It seems to me, that the settlement of this child was in the parish where born. The cases cited, where the child was born pending the orders of removal, were cases in which the act of God interfered; but here the order had been executed and completely carried into effect.

Lord *Tenterden* C. J. concurred.

Parke J. Here the order of removal had been actually executed. The woman had been brought to Manchester and accepted there. The order is not to be considered as pending during the time that there was an opportunity of appealing against it.

Order of sessions confirmed.—*Rex* v. *Halifax.* E. T. May, 1831.

INLAND BILL OF EXCHANGE.

A bill of exchange drawn in Ireland, *on a person in* England, *is not an inland bill of exchange, and therefore does not require an acceptance under* 1 & 2 *Geo.* 4. c. 78. § 2.

Assumpsit on a bill of exchange drawn at *Limerick*, in *Ireland*, upon the defendants, living in *England*, and accepted by them, but not by a written acceptance; and the question for the opinion of the Court was, whether it was to be considered as an inland bill so as to require an acceptance in writing within the stat. 1 & 2 Geo. 4. c. 78. § 2.

Follett for the plaintiff. An inland bill of exchange is one drawn in England. The statute 9 & 10 W. 3. c. 17., which puts them on the same footing as foreign bills, declares what are to be considered as such. A bill drawn in *Scotland*, on a person in *England*, is not an inland bill; and *Ireland*, though subject to the crown of England, is not part of the country. *Smith* v. *Mingay*, 1 M. & S. 87. 1 Black. Com. 101. Bell's Common Law of Scotland, 418, 419. *Ferguson* v. *Balsh.* *Reynolds* v. *Lyme*, Id. 280. *Campbell, contrà.* The stat. 1 & 2 Geo. 4. c. 78. § 2. applies to all parts of the United Kingdom; and from the language of stat. 9 Geo. 4. c. 24. which was passed before this bill was drawn, it is clear that such is the law all over the kingdom. It is for public convenience that merchants living at a distance should be allowed to accept bills in this way. Foreign bills are not mentioned in the stat. 1 & 2 Geo. 4. because the legislature might not have wished to interfere with foreign laws; but there could be no inconvenience in allowing any bill drawn in one part of his Majesty's dominions on any other part, to be considered as an inland bill.

"Bills and notes are either inland or foreign; —inland, when made payable within this kingdom; and foreign, when made or payable abroad."— *Bayley on Bills*, 22.

Ireland cannot be considered abroad, for since the union it is part of the kingdom.

Parke J. A bill drawn in *England* and made

payable in *Ireland*, would be stamped as a foreign bill.

Campbell. It might be considered as such for the purposes of the Stamp Act, as there might be one regulation as to bills drawn in one county in England, and a different one as to those drawn in another. The authorities from *Scotland* ought to have no weight, as the Scotch tribunal is entitled to no respect whatever on commercial questions.

Lord *Tenterden* C. J. I am of opinion that this is not an inland bill within the stat. 1 & 2 Geo. 4. c. 78. § 2. The stat. 9 & 10 W. 3. c. 17. very distinctly explained what is an inland bill of exchange; namely, a bill of exchange drawn in or dated at any trading city or town, or any other place in the kingdom of *England*, dominion of *Wales*, or town of *Berwick-upon-Tweed*. Before the union with *Scotland*, it could not have been considered as an inland bill, and so with regard to *Ireland*. The question is, Has the act of union changed the law on the subject? I am of opinion that it has not.

The other Judges concurred.

Judgment for the plaintiff.— *Mahony* v. *Ashlin*. T. T. May 27. 1831.

PLEADING — PARISH — NECESSARY ALLEGATION.

In an action of replevin *it is necessary to state a parish or place in which, in the county, the cause of action arose.*

The declaration stated, that defendant took the goods, &c. in a certain dwelling-house in the county aforesaid, not stating any parish or place where it was situate.

Kelly, in support of the demurrer, cited Com. Dig. tit. Pleader, 3 K. 10., *Bullithorpe* v. *Turner*, Wils. 475.; *Johnson* v. *Woodzer*, 1 Str. 507., and *Potton* v. *Bradley*, 2 Moore & P. 78., as authorities that the place is material.

Hoggins, contrà. All the authorities are very old, except *Potton* v. *Bradley*, which was for not setting out abuttals. The case of *Ware* v. *Boydell*, 3 M. & S. 148. is relied on for the plaintiff, and the question is, whether the doctrine of that case is to be extended to one like the present.

Lord *Tenterden* C. J. This differs essentially from the case of *Ware* v. *Boydell*; that was *assumpsit*, here the place is traversable.

The other Judges concurred.

Judgment for defendant. — *O'Neill* v. *Paul*. T. T. May 27. 1831.

POLICY OF INSURANCE — PILOT — SEAWORTHINESS.

Where a ship is going into *port, and the captain cannot find a pilot, then he may use his discretion as to whether he will wait until he can procure one.*

This was an action on a policy of insurance, tried before *Bayley* J. at Lancaster. Verdict for the plaintiff. A rule for a new trial having been obtained, cause was now shown against it. The loss was by perils of the sea, which happened while the ship was going into port. It appeared that the captain could not find a pilot at the time of his going into port, and the question was, whether he was bound to wait until he could procure one.

Evans, Joshua, in support of the rule, contended for the necessity of a pilot, and that, if a vessel went into port without one, she would not be seaworthy. He cited *Law* v. *Hollingworth*, 6 T. R. 160.

Parke J. That was the case of a ship going *out* of port without a pilot, when one can always be had.

Evans. In Abbot on Shipping, p. 222., it is laid down, that it is the bounden duty of the master or owner, if a pilot be required, to take one in.

Lord *Tenterden* C. J. If the master be a person of competent skill, though he may be mistaken, it is a general rule that the underwriters are liable. The case of *Law* v. *Hollingworth* was coming *out* of port. If the master here used due diligence to procure a pilot, and failed, he had a right to exercise his own discretion.

Littledale J. The general rule is as Mr. *Evans* has laid it down; but the master must, in some cases, be left to exercise a reasonable discretion.

Parke J. The term "seaworthy" means having a competent master, a competent crew, and a pilot, where, by usage, a pilot is necessary; but if a ship be sailing where a pilot cannot always be procured, it is only necessary to use due diligence to obtain one. This case is not distinguishable from that of sailing with a competent crew.*

Patteson J., having been counsel in the cause, gave no opinion.

Phillips v. *Headlam*. E. T. May 5. 1831.

MINOR CORRESPONDENCE.

DELIVERY OF SIGNED BILL OF COSTS.

A solicitor's bill of costs, where two assignees are jointly liable, is signed and delivered to one assignee only, who is not the acting or managing assignee (though it is said that he gave some instructions to the solicitor). The solicitor does not seek to enforce payment from this assignee, but treats him as a nominal defendant, having served him with common process. The other assignee, to whom no bill has been delivered, nor any application for payment made, is held to special bail in the action brought on this bill. The assignee arrested had no knowledge of the delivery of the bill to his co-assignee, and was obliged to obtain a copy of it under a Judge's order. The two assignees do not communicate with each other. Is a bill of costs so delivered, viewing the course pursued by the attorney in his action, a sufficient compliance with 2 Geo. 2. c. 23. § 23.?

W. S.

*** Our correspondent observes that the decision in *Finchett* v. *How*, 2 Camp. 275., in some respects applies to this case, but not sufficiently.

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* *Stuart* v. *Powell*, 1 B. & Ad. 366.

NEW RULES — DECLARATION.

SIR,

I HAVE no doubt but some of your correspondents can inform me whether, under the late new rules, in declaring in an action on a bill of exchange payable at a *particular place*, after following the form prescribed by the new rules, the usual averment is necessary, and whether the same would be allowed the plaintiff on taxation of costs? or, what should be the form of averment?

F. H.

SIR,

WITH respect to my queries at p. 166., I beg to observe,

1st. That if "the third day exclusive before the last day of the term," is not what is called "the last return of the term," but "the last *general* return of the term," I was misled by the wording of all the rules of all the Courts.

2d. Can H. F. G. point out one instance in which a plaintiff, upon a declaration filed or delivered *de bene esse*, will be able to obtain a plea, by virtue of the new rule, sooner than he could by the old one? If he cannot, it appears to me that there is no necessity for its relating to declarations *de bene esse*, and that consequently, and inasmuch as it is inconsistent with the rules which govern the filing and delivery of them, it does not relate to them.

3d. and 4th. Protesting against H. F. G.'s construing "delivery," to mean "filing," I beg to ask, Would it not have been better, had the Judges told us plainly what it is they do mean?

J. C.

QUERIES.

EXECUTOR'S LIABILITY — DILAPIDATIONS.

A testator dies leaving property, principally of leasehold houses, and held subject to the usual repairing covenants; can his executors, after sale of such property, safely divide the proceeds among testator's next of kin, without reserving any fund to answer for dilapidations at the expiration of the terms? and could executors under such circumstances plead to an action brought by the original lessor, for the amount of such dilapidations, "*plene administravit*," they having full notice that such dilapidations would exist, and that such claim would be made? X.

ARREST — ESCAPE.

If an officer goes to arrest a defendant, and the defendant makes an excuse, and gets away while the officer is in his house, can the plaintiff bring an action against the sheriff or officer for an escape?

LEASE — REPAIRS.

A. holds a house of *B.* under a lease containing the usual covenants to repair, paint, &c. and to leave at the end of term, well and sufficiently repaired, painted, &c. The lease expired at Midsummer day. The premises are in good substantial repair, but require painting, papering, &c. *A.* has agreed to take the premises for a twelvemonth of *B.*, under an agreement for *B.* to do all repairs. Will the acceptance by *B.* of the half-year's rent due at Midsummer last, operate as a waiver of all claim he may have on *A.* for not painting, papering, &c.? I. A. H.

FEME COVERT.

A. is separated from her husband, and has been so for fourteen or fifteen years. He is in the country, or abroad, and she brings up all her children in London. She applies to *B.* for a loan of 20*l.* to pay her travelling expenses to a place in the country, where she and her children have engagements by which they obtain their livelihood. Will an action be sustainable against her for the recovery of the 20*l.*, the credit being given with the knowledge of her being a married woman? and will a plea of coverture be available to defeat it? D. E. S.

ASSIGNMENT OF TERMS.

A. purchases an estate, and, to bar dower, has it conveyed to him and a trustee, *and their heirs*; but as to the estate of the trustee and his heirs in trust only for *A.*, his heirs and assigns, and to dispose thereof as he or they shall direct. *A* demises a term of 1000 years by way of mortgage while the trustee is alive, who does not join in the deed; the mortgage is afterwards paid off, and the term assigned to attend the inheritance in the usual way. Will this term protect the estate from incumbrance, either before or after the trustee's death? and if the trustee's estate had been a joint tenancy *for life only*, would that have made any difference? A.

MORTGAGE POWER.

A. demises to *B.*, his executors and administrators, for 1000 years: a power is reserved to *B.*, his executors or administrators, either to sell the residue of the term, or to sell *and convey the fee simple* of the premises, on default of payment of the mortgage-money. It is presumed *B.* could sell the fee under the above power; but could he convey it without *A.* or his heirs becoming parties to the deed? A.

REVOCATION AND APPOINTMENT.

A. by way of mortgage conveys by lease and release to *B.* and his heirs, (who is a mere trustee without any estate,) to the use of *C.* for 2000 years, with remainder to *A.* in fee; a power is given to *C.*, his executors or administrators, on default of payment, to sell the premises, to revoke the above uses, and declare fresh uses in fee to the purchaser of the mortgaged premises. Would *C.*'s revocation and appointment, either before or after the death of *A.*, be a good conveyance of the fee, without *A.*, or his heirs being parties to the deed? and could a purchaser refuse the title, without *A.* or his heirs executing the same? A.

ESTATE TAIL.

A. has an estate to him and the heirs of his body, which is an estate tail: a stranger enters and holds adversely for 23 years, and during

that time, *A.* makes no entry, and prosecutes no suit pursuant to 21 James I. c. 16., and 4 & 5 Ann. c. 16. Is the estate tail destroyed by *A*'s. neglect? *or* could his heir possess himself of the property on *A*'s. death by ejectment, writ of formedon, or bill in equity? A.

LEGACY — GRANDCHILD.

A, by his will, leaves a sum of money in the funds to his executors, in trust to pay the *interest* thereof to his daughter *B.* for life; and after her death in trust for all and every the child or children of his said daughter living at her decease; but if no child, then the daughter *B.* to have the power of disposing thereof by will. *B.* died, leaving a *grandchild only*. Is such grandchild to be considered the *child* of *B.*, and entitled to the trust funds? or had *B.* the power to dispose of it by her will? T. D.

TRANSFER OF MORTGAGE — AD VALOREM.

A mortgage in fee was executed by *A.* to *B.*, which was subsequently transferred to *C.*, *D.*, and *E.* A second mortgage (by demise) was afterwards executed by *A.* to *C.* for securing a further sum. *F.* has agreed to pay off both these mortgages, and to lend *A.* 200*l.* in addition. It has been proposed that *C.*, *D.*, and *E.* shall transfer the first mortgage, and *C.* the second mortgage, and that the mortgagor shall join with them in conveying the premises. No power of sale is contained in either of the two subsisting mortgages, and it has therefore been proposed that such a power shall be inserted in the intended transfer and further charge, to take effect in default of payment of the further sum of 200*l.* at the time to be appointed for payment thereof, and that *F.*, the mortgagee, be empowered, out of the proceeds, to retain not only the 200*l.* but also the sum secured by the two existing mortgages. It is also intended to insert a covenant to insure to an amount sufficient to cover all the sums secured on the property, and to charge the premiums on the premises.

1. Will the *ad valorem* duty be payable on the amount of the two existing mortgages and the further sum of 200*l.*, or only on the latter sum?

2. If a fresh proviso for redemption be inserted in transfers of mortgages, will that render them liable to the *ad valorem* duty?

MARRIAGE — MINOR.

A. intermarried with *B.* by licence. Shortly after the solemnisation of the marriage, disputes arose between the parties, and a deed of separation was executed. *A.* afterwards found that *B.* was not of age until after the marriage took place. Can the marriage be annulled? A. H.

ILLEGITIMACY — DOWER.

A. has two illegitimate children by *B.*, both females, who are baptized by the surname of their father, *C. A.* and *D. A.*, and brought up with him as his lawful daughters. Some time after the birth of the last child, *A.* and *B.* are married, but have always hitherto lived together as man and wife. *C. A.* is married (in the name by which she was baptized) to *F. G.*, who dies possessed of freehold property, without issue and without a will. Before the death of *F. G.*, *D. A.* marries *H. M*, by which marriage they have three children.

Is *C. A.* entitled to dower of the estates of her husband *F. G.*, and is she lawfully married since the law says, "No *bastard* can be allowed to take its father's surname." And lastly, are the children of *D. A.* and *H. M.* lawfully begotten. H. F. H.

MISCELLANEA.

LORD CHANCELLOR GUILFORD — SIX CLERKS' GIFTS.

"One thing more was talked in coffee-houses concerning his Lordship, but by them only who were the culpables. The Six Clerks have great dependence on the course of the Court of Chancery for their profits, and are always disposed to keep the Judge in good humour, and prevent alterations to their prejudice. And all the Judges of the Courts make no scruple to accept presents of value from the officers, by way of New Year's gift, or otherwise; which is a practice not very commendable, because with some it may have bad effects. Accordingly these six clerks clubbed, and made a present to his Lordship of 1000*l.*, which he took as an instance of their respect, without regard to or knowledge of any other design or intention of theirs. But soon after this they began to fall out with the sixty under-clerks, and pretended to remove them at pleasure, being their substitutes, for whom they were to answer, as masters turn servants away whom they can no longer trust.

"The sixty on the other side stood upon it that they bought and paid for their seats, were sworn into their places, and however they were subject and accountable to the six, they were not at their mercy to be removed without the authority of the Court.

"The six thought fit to put in practice their own authority, and began with one Sewell, a clerk, one of the sixty, and ordered him out of his seat; and, as I remember, gave it to another. This produced a petition of this Sewell to his Lordship, praying to be restored, and the rest of the sixty confirmed in their places, of which decree the justice is unexceptionable. It is no wonder that the six were infinitely disgusted; for if they had any bad design, as it seems plainly they had, of adding sixty to their six, they had their reward. I am firmly persuaded that his Lordship knew nothing of it till the cause upon the petition came before him; and if he had known it before, he had not accepted their kindness, and that afterwards he repented him of it." — *Lord Guilford's Life.*

CURIOUS WILL OF AN ATTORNEY.

Mr. Lambe, an attorney, who died at Cambridge, in the year 1800, left about 1100*l.*, and directed his executors (three gentlemen of the University) to appropriate the sum of 800*l.* as they might think proper. For this arduous task he bequeathed them one hundred pounds each.—*From a Correspondent.*

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——— "Quod magis ad NOS
Pertinet, et nescire malum est, agitamus."
HORAT.

ON THE PROLONGATION OF THE SITTINGS OF THE LORD CHANCELLOR'S COURT.

FORTUNATELY for that part of our readers who trouble themselves with our opinions, we belong to no party. Whigs please us not, "nor Tories neither;" we are careless who are in or out. We have no deep design of unseating one chancellor, and of bringing in another. And we beg leave privately to assure our readers, that we have no possible intention of taking office either under the present or any future administration. Consistently with this feeling we have supported that side of every question which we have discussed, that, on deliberation, appeared to us the just and reasonable one. In doing this, the measures and condcut of the present Lord Chancellor have frequently come under our notice; we have not been slow to award him a fair share of praise; neither have we shrunk at any time from pointing out his faults, or exposing the fallacies and disadvantages of the measures that he has brought forward. This latter part of our duty has frequently been irksome. We cannot look back upon his useful life, his varied talents, his proud independence, without acknowledging his fair claim to the high reward which he has received. These feelings, however, are frequently tinged by a shade of something like fear, that he may employ his vast power in the introduction of some plan that will be injurious to the best interests of the country.

We occasionally view him with the same feeling that the astronomer watches a comet, when, admiring and wondering at its surpassing beauty, he shudders when he thinks that its disastrous and eccentric force may one day bring ruin and destruction on the world. We have not unfrequently rejoiced and exulted most in the glory of those heavens that foretold to more experienced eyes the approach of storms and desolation.

We fear we shall run some risk of furnishing a new extract for the immortal treatise of Scriblerus, if we plunge at once into the technical matters that have occasioned these thoughts. We think, however, that some of the plans of which the Lord Chancellor is the introducer, such as the Local Court Bill and the Bankrupt Court Bill, are open to the greatest objection; nor have we as yet seen any one measure which he has originated that has appeared to us to bear those marks of patient deliberation, of earnest enquiry and sagacious experience, that can alone render extensive innovation acceptable or expedient.

Thus much, however, for the past. We are now desirous of saying a few words on the last bill introduced by the Chancellor into the House, and the occasion of its introduction. This was shortly as follows: —

The Lord Chancellor has repeatedly announced his intention of disposing of his appeals before the rising of the Court. Although a very considerable number of them have been heard, it was found impossible to get through the remainder before the 10th of the present month, the day appointed for the rising of the Court. We think it not a small point in favour of the Lord Chancellor, that he immediately declared his intention of sitting over the time appointed for the purpose of despatching the remaining appeals; nor can we conceive that when the head of the Court, and of the law, has so resolved, that it is reasonable or even endurable that he should be opposed in so righteous a determination. We were, therefore, not a little surprised to learn that a determined stand would be made against this resolution of the Lord Chancellor, and that it would be opposed in every possible way.

After making several minor complaints as to the changes which had been made, Sir Edward Sugden, the leader, if not the *alpha* and *omega* of this opposition, declared that it would be impossible to hear any more appeals after the last seal, inasmuch as no affidavit could after that time be filed. What grounds he had for this declaration we have not been able to learn. We are unwilling even to hint that mere factious motives should have induced him to attempt to impede the administration of justice. But, at any rate, if doubt existed before on the point, it has now ceased. The bill which the Lord Chancellor would have introduced on the subject was declared by the highest authority unnecessary, and the course of business now "runs smooth."

It is hard, indeed, we admit, we know it, alas! from sad experience, to abridge a long vacation. It is hard to deprive one's self of a trip that had been planned for months before. Penned up within four brick walls, we cannot restrain a sigh for scenes we have long since visited, that rise up again before us; the magnificent Rhine, with her venerable castles and joyous vintage;—the impetuous Danube, with her innocent peasantry and splendid cities;—the romantic Loire—but we must stop here;—all these, and many others, we admit, it is delightful to visit, and delightful to remember. But this feeling must not be carried too far; and if it be the pleasure of the Lord Chancellor to sit throughout the whole vacation, it is the duty of the Bar to submit, and to labour to despatch rather than impede the public business.

We were pained, therefore, to see the opposition made to it by Sir Edward Sugden; and convinced that the Lord Chancellor is this time in the right, we have thought it proper to declare our opinion.

MEMOIR OF THE LATE LORD NORBURY.

The biographical materials of this celebrated wit and lawyer are somewhat scanty. His sayings are, indeed, sufficiently numerous, especially if we include all the good things which have been ascribed to his Lordship; but in other respects we can find but little that would be acceptable to our readers.

We might, indeed, from the debates of the Irish House of Commons, cull some particulars that would interest the political partisan; but we are not aware that Lord Norbury attempted any improvements in the law; nor was he remarkable for any elaborate display of eloquence of which we could avail ourselves consistently with our plan. Such notes of his life, however, as we have been able to obtain, we now present to our readers.

The late Earl was the second son of Daniel Toler, Esq. of Beckwood, in the county of Tipperary. He was educated for the law, and became a member of the Irish Bar. He soon rendered himself conspicuous as an advocate of Tory principles; and we are told that he was first returned to the Irish parliament through the influence of the "undertakers," as they were called, who managed the Irish House of Commons.

His services to the ministerial leaders procured him, in the year 1789, the office of Solicitor-General of Ireland; and some years afterwards, namely, in 1798, he was appointed Attorney-General.

On the 20th of December, 1800, he was made Lord Chief Justice of the Common Pleas, and retained that station till 1827, when he was succeeded by Lord Plunkett. The dignity of Baron Norbury was conferred on his Lordship in 1800; and on his retirement from the Bench he was raised to the rank of Earl of Norbury and Viscount Glandine. At his death he was a privy councillor in Ireland, and a visiter of Maynooth College. He enjoyed the retired pension of 4000l. a year.

The Earl's consort, Grace Graham, the daughter of Hector Graham, Esq., was created a peeress in her own right in 1797 by the title of Baroness Norwood. The eldest son of his Lordship succeeded in 1822 to the barony of Norwood. The second son, Hector John Graham Toler, inherits under the patent the honours of the late Earl, and is married to the only daughter and heiress of William Brabazon, and niece to Sir Anthony Brabazon.

The deceased has left, besides these sons, two daughters: Lady Isabella Toler, who is unmarried; and Lady Lætitia, married to Wm. Browne, Esq. of Browne's Hill, in the county of Carlow.

As containing characteristic sketches of his Lordship, we shall avail ourselves of the lively pages of Sir *Jonah Barrington*, who thus describes a quarrel between his Lordship and himself in the Irish House of Commons:—

> Lord Norbury, then Mr. Toler, went circuit, as Judge the first circuit I went as barrister. He continued many years my friend, as warmly as he possibly could be the friend of any one, (he had been a sporting companion of my uncle, Harry French,) and I thought he was in earnest. One evening, however, coming hot with the Tuscan grape from Lord Clare's (at that time

my proclaimed enemy,) he attacked me with an after dinner volubility which hurt and roused me very much. I kept indifferent bounds myself, but he was generally so very good tempered, that I really felt a repugnance to indulge him with as tart a reply as a stranger would have received; and simply observed that "I should just give him that character which developed itself by his versatility; namely, that *he had a hand for every man, and a heart for nobody!*" I did not say this in an incensed tone, though I fear the sarcasm has stuck to him from that day to this. He returned a *very* warm answer, gave me a wink, and made his exit; of course I followed. The serjeant-at-arms was instantly sent by the Speaker to pursue us with his attendants, and to bring both refractory members back to the House. Toler was caught by the skirts of his coat fastening in a door, and they laid hold of him just as the skirts were torn completely off. I was overtaken (while running away) in Nassau Street; and as I resisted, was brought like a sack on a man's shoulders, to the admiration of the mob, and thrown down in the body of the House. The Speaker told us we must give our honours forthwith that the matter should proceed no further. Toler got up to defend himself; but, as he then had no skirts to his coat, made a most ludicrous figure; and *Curran* put a finishing stroke to the comicality of the scene, by gravely saying, that it was the most unparalleled insult ever offered to the House, as it appeared that one honourable member had *trimmed* another honourable member's *jacket* within these walls, and nearly within view of the Speaker! A general roar of laughter ensued. I gave my honour, as required, I think with more good will than Toler; and would willingly have forgotten the affair altogether, which he apparently never did. I only hope, that when his memory declines (which time cannot be very far off now), our quarrels will be the first circumstance which slips it. If I could forget any thing, I should long ago have lost all recollection thereof.

Some amusing anecdotes at a dinner party of Lord Redesdale are related by Sir Jonah, but they have been quoted too recently to justify our extracting them.

Another scene is presented in the Irish House of Commons, in the close of which the wit of Lord Norbury is advantageously exhibited. The son of the celebrated Mr. Burke having been appointed by the Catholics to superintend the progress of the bills for emancipation, —

The young delegate, either totally ignorant of parliamentary rules, or supposing that in a disturbed country like Ireland they would be dispensed with (especially in favour of a son of the great Burke), determined he would present one of the petitions himself; not at the bar, but in the body of the House. Accordingly, he descended from the gallery, walked in the body of the House with a long roll of parchment under his arm, and had arrived near the Treasury Bench, when a general cry of "Privilege! A stranger in the House!" arose from all quarters, and checked the progress of the intruder; but when the Speaker, in his loud and dignified tone, called out, "Serjeant-at-arms, do your duty!" it seemed to echo like thunder in Burke's ears; he felt the awkwardness of his situation, and ran towards the bar. Here he was met by the serjeant-at-arms with a drawn sword: retracing his steps, he was stopped by the clerk; and the serjeant gaining on him, with a feeling of trepidation he commenced actual flight! The doorkeepers at the corridor now joined in pursuit; but at length, after an excellent chase (the members all keeping their seats), he forced through the enemy behind the Speaker's chair, and escaped! no doubt to his great satisfaction. Strong measures were immediately proposed; messengers despatched in all quarters to arrest him: very few knew who he was: when Lord Norbury (with that vivacious promptness which he always possessed), on its being observed that no such transaction had ever occurred before, exclaimed, — "Yes, I found the same incident some few days back in the *cross readings* of the columns of a newspaper. 'Yesterday, a petition was presented to the House of Commons — it fortunately *missed fire*, and the villain ran off!'" It was impossible to withstand this sally, which put the House in a moment into good humour.

The following story relates to his Lordship subsequently to his elevation to the Bench. It was stated in one of the papers, which always rejoiced to adopt any tale of which Lord Norbury was the hero, that his Lordship had appeared on the Bench in a *masquerade dress*. Sir Jonah Barrington, who was present at that occurrence, informs us that it was totally a mistake; so much so indeed, that his Lordship did not seem to be conscious of his habiliments, even whilst every person in court was staring with astonishment. It appears that, some time previously, Lady Castlereagh had given a very splendid masquerade;

"At which," says Sir Jonah, "I saw the Chief Justice in the dress and character of *Hawthorn*, in 'Love in a Village;' and well did he enact that part. The dress was a green tabinet, with mother-of-pearl buttons, striped yellow and black waistcoat, and buff breeches, and was altogether cool and light. On going the next circuit (the weather being excessively sultry, and his Lordship having a great press of sentences to pass on rebels, &c. at Carlow) he put on, under his robes, the lightest vestments in his wardrobe. Now, be it remembered, that the use of the said masquerade dress was a secret except to the robes that covered it; and neither the passing nor future generations would ever have heard a word of the green jacket, if the said robes had kept themselves close, as the Chief Justice had carefully provided before the sounding of the trumpet. The warmth of the day, however, and the variety of appropriate addresses necessary to be framed for so many convicted criminals, might be expected to take away a certain quantity of any man's precau-

tion; and as a Chief Justice is but a man, Lord Norbury fell into the snare! and, feeling the heat insufferable (which the twisting his wig sideways did not relieve), he involuntarily first turned up the sleeves of his robe, then loosened the zone round his waist: the robe being now free from all restraint, thought it had a right to steal away from the green jacket; and thus the unconscious Chief Justice, the representative of the King, 'stood confessed' to the auditory in the Court-house as representative of a very different character from that of his Majesty."

In the extraordinary list which Sir Jonah Barrington has given of official duellists who figured in his time, and some of them in his own presence, we find the subject of this memoir. Ireland, for its number of grave personages who appear to have adopted the national taste (though in most instances before their elevation to the Bench), may challenge any country in Europe to produce such an assemblage of gallant *judicial* and *official* antagonists at fire and sword as is exhibited in Sir Jonah's catalogue.

Amongst Chancellors, Chief Justices, Masters of the Rolls, Judges and Barons, we extract the following:—

"The Chief Justice C. P., Lord Norbury, fought Fire-eater Fitzgerald, and two other gentlemen, *muzzle to muzzle*, and frightened Napper Tandy and several besides: one hit only.—Napper was near being hanged for running away."

In a subsequent part of the "Personal Sketches of his own Times," the writer observes that most of the counties of Ireland could boast their *point-of honour* men, and "the late Chief Justice of the Common Pleas was supposed to understand 'the thing' as well as any gentleman in Ireland, and was frequently referred to by the high circles."

We forbear entering on numerous examples of his Lordship's peculiar characteristics, some of which, perhaps, have been exaggerated; and we have no intention at present to introduce a lengthened dissertation on the qualities which are most seemly in a Chief Justice. Amongst the diversities of human endowments there are some individuals fitted, both intellectually and morally, for the grave and important station of a Judge; whilst others possess attainments admirably adapted for the Bar, or for the stormy scene of a popular debate. It is for those who select the individuals to fill the vacancies on the judgment seat to consider who will best uphold its dignity. We cannot expect the frequent exhibition of that Roman virtue which sacrifices self interest for the country's good; and therefore we blame not those gifted men who have been the ornament of the Bar, when they accept appointments for which nature never intended them; yet we cannot but regret that, on both sides of the Channel, it has sometimes happened that the public were deprived of their best advocates without the consolation of obtaining good Judges in their stead.

On the other hand, there have been some men passed by, whose forensic eloquence was by no means eminent, but who were peculiarly distinguished for judicial qualities. As an example of this kind, we may mention the late Mr. Serjt. Lens. It rarely happens that the talents of a very successful advocate are combined with profound legal learning. Lords Eldon, Ellenborough, and Lyndhurst, and perhaps Sir James Scarlett, are exceptions to the rule; but, in general, our best Judges have been taken from a class of lawyers who were not remarkable in the *Nisi Prius* Courts. If these remarks be well founded, it follows that Lord Norbury was not exactly the person best fitted to preside in the Court of Common Pleas, where, however, he retained his seat for the long period of twenty-seven years.

Of Lord Norbury's talents, the world seems agreed that the most celebrated was his *wit:* in this he appears to have been exceedingly fertile and ready. But the public journals have chiefly made us acquainted with his distinguished merit as a punster. We are disposed, however, to think that his fame ought not to rest on that humble but amusing exercise of the faculties. We agree with Sir Jonah Barrington, that his Lordship had great readiness of repartee; and we rather hesitate in concurring with his contemporary, that he possessed neither classical wit nor genuine sentiment.

He was a most adventurous talker—"he had a fling at every thing; and, failing in one attempt, made another; sure of carrying his point before he relinquished his efforts."

His extreme good temper was a great advantage; but, notwithstanding his pleasantry, he appears to have acquired a character for severity. Among the lower classes of the Irish, he was known as "the hanging Judge." If this be an unjust accusation, we hope it will be corrected. Perhaps it may be urged that it was impossible to administer the laws in Ireland with the mildness that may be safely exercised in this part of the empire.

HINTS TO PRACTITIONERS.

No. IV.

BILLS OF COSTS AND ACCOUNTS.

It is too much the practice of solicitors and their clerks to treat bills and accounts as matters of a secondary nature, whereas the success of a solicitor through life depends on his attention to his bills and accounts; and this is one of the chief points, therefore, to which an articled clerk should direct his attention.

Every shopkeeper, almost, has his counting-house and a desk, to post his books and make out his bills; but solicitors think nothing of this, which ought to be one of their primary objects. Because they have clerks, who are attending to *other* matters, they think they are sufficient for the purpose of their books, bills, and accounts; but they are not sufficient; and whatever assistance they may render, there should be a clerk, whose sole business, or whose chief and *first* business, should be that of attending to the bills and accounts. If such clerk be not fully employed upon bills and accounts, then, and not till then, should he be otherwise employed in the office.

No clerk who has the care of the books and accounts can keep them properly, if the solicitor, and his articled and other clerks, do not regularly and fully make entries of the charges for the business they do, and of the disbursements they make, every day. Hence, then, it is evident that every articled and other clerk should accustom themselves (at the very outset of their clerkship), for their own advantage, and to prevent loss to themselves in their disbursements, to be very particular in making their entries daily. If they do this, they will give satisfaction to their principals, and lay the foundation of their future success, in a pecuniary point of view.

The entries of the charges and disbursements should be posted into a day-book or journal, under each client's name; the disbursements being *also* posted into a disbursement book, which should have two columns (one for the disbursements in business, and the other for management); and if the entries are carefully and fully made, the day-book may contain the bill as it may be delivered, or a draft may be easily drawn out and settled for delivery to the client.

Before a bill is sent in, care must be bestowed upon it, as it generally contains an historical account of the business; and, for this reason, the copying of the bills will tend to elucidate and explain the proceedings of a solicitor in his clients' cases, and therefore is recommended to be done by articled clerks for their own information and improvement.

A *cash-book*, of course, is kept by the solicitor, containing all his receipts and payments; and these are posted into the clients' accounts, which are kept in a *leger;* and in this leger should be entered the amount of the bill, and the money received for or on account of it. When an account is rendered to a client, if it contain all the entries in the leger, then it is not necessary to keep a copy of the account current; but if the account rendered should not contain all that is in the leger (for frequently money is received and applied for a specific purpose), then a copy of the account current should be kept in an account current book.

DIRECTIONS FOR MAKING OUT BILLS.

1. Examine whether any former bill has been made out in the same business, or to the same party; and if so, carefully peruse and consider the same.

2. Ascertain, by search, if any draft bill has already been prepared; and if so, add to, amend, or alter such draft, or begin *de novo*.

3. Inspect all the entries in the day-books, from first to last.

4. Collect all the papers together, and understand the leading points of business.

5. Arrange the papers according to their dates, and indorse their contents, if not already done.

6. Look up and examine all letters written and received.

7. Arrange all the letters according to their dates, and indorse the names of the parties from whom they come, the dates, and heads of their contents.

8. Then begin the bill, making charges fuller (if necessary) than the entries; and draw the bill on draft paper, bookwise, in roundabouts, with a small margin for binding.

9. If the bill relate to Chancery business, look for a precedent in the Chancery costs, and read the charges therein from beginning to end.

10. If in the King's Bench, the like.

11. If in the Common Pleas, the like.

12. If in Bankruptcy, look to bills made out in similar business, and read them throughout.

13. If, on going through a bill, there should be any blanks for folios, or any

queries, put them on a sheet of paper, and annex it to a draft bill, to be filled up and answered before the bill is considered as drawn. If the bill relates to different suits, &c., keep each distinct.

14. In drawing a bill, see that the history or chain is preserved throughout, so that on reading it the nature of the business, and what has been done, may be clearly seen and understood; but so that the statements do not excite blame, or any improper observation on any one.

15. In charging letters, be particular in stating their contents shortly; and if, from their contents, it should appear, that attendances must have been had or business done, which may not have been posted, supply them, noting in the draft that the attendances or businesses are not in the day-books.

16. In charging for an attendance, or any business done, look to the consequences of such attendances or business, or whatever follows, and noting the same as in the last article.

17. Let the papers be put away and indexed when the bill is made out, and let all papers taken out of bundles already indexed be returned when done with.

This is the season of the year when such matters are attended to in most of the attorneys' offices; and as it is impossible to enforce too strongly the most strict attention to this part of a solicitor's business, and especially the duties of clerks in keeping regular accounts, and making entries of all the business they transact, we subjoin some extracts from Mr. Palmer's "Directions," as given in his "New Table of Costs."

Enter immediately in a day-book an account of all disbursements in business, as they occur; on whose behalf, and in what cause. In setting down moneys paid for office copies, such as affidavits, charges, &c. &c., specify what is paid for each article separately, instead of charging in the lump, with the number of folios. The clerk's account of receipts and payments should be examined once a week. Set down all extra attendances: others, as attending to take instructions, to fee counsel, &c. will be recollected as matters of course; though it is better to be too full than too sparing in that respect. Enter every thing that is copied or engrossed, with the number of folios, which should be reckoned before the papers leave the clerk's office; and in case of engrossments, take care to add, at the time, the charge for parchment and stamps.

When briefs of cases, or abstracts, are drawn or copied, set down the number of brief sheets as soon as done.

When pleadings are abbreviated, set down the number of folios, as well as the number of brief sheets.

In the case of bills or answers filed at the Six Clerks' or Exchequer office, ascertain, as soon as may be, the number of folios, which should be noted on the draft, and also entered in the book.

When pleadings or conveyances are drawn by counsel or special pleaders with whom an account is kept, mark in pencil on each draft what the fee will be, and also enter it in the book.

Charge for all attendances on Judges' summonses and Masters' warrants, mentioning shortly the subject and the result.

Charge for attendances in Court, and note down the days a cause is in the paper.

Keep copies of all letters sent, and charge them in the day-book, and state shortly the subjects.

Let the foregoing be regularly transferred, the following day, to the accounts of the respective clients, keeping each business distinct.

The observance of the preceding few rules will save more trouble and time than can, at first, be easily conceived. Instead of being obliged to search for a draft, then to compute its length, or to examine the stationer's book, or the special pleader's account, or to inspect the disbursement book, &c. &c., the whole bill may be drawn out without impediment or delay, or having occasion to make a single reference; and if a paper should happen to be mislaid, it will be of no consequence.

After a bill is drawn out, examine it with the papers, (which should be sorted, properly placed, and tied up together,) in order to be sure that there is no error or omission.

When a draft bill is settled, let it be entered in the bill-book, and the balance struck. Every bill should be delivered once a year at farthest: and if the client cannot pay, let him give a security bearing interest.

REVIEW.

A Practical Treatise on the Analogy between Legal and Equitable Estates and Modes of Alienation. **By Henry Jickling, Esq. of Lincoln's Inn, Barrister at Law. London: Stevens and Sons.**

We consider this to be a learned and valuable book, though we understand it has not hitherto been distinguished by the success it deserves. Though aiming to be practical, it is, perhaps, not so commonly useful to the general practitioner as to ensure any extensive circulation. We cannot say that this is owing to any fault of the author, but rather to the nature of his subject, and the necessity of treating it, as he has done, so much at large. We think, however, that although the younger class of students may avoid adding this work to the otherwise sufficiently expensive stock of standard publications, it ought to find a place in every extensive library.

We cannot undertake to enter minutely into its merits, or to give such extracts as may enable our readers to judge of the execution of the author's design; but we shall put them into possession of the scope and object of the book, with an analysis of its contents:—

"There is a prevailing notion," says Mr. Jickling, "that (*dower* excepted) the analogy between law and equity is complete—that a doctrine established of the legal, is consequentially true of the equitable estate—and that the rule is not confined to the interest itself, but extends to the modes of acquisition and transfer.

"To this view, erroneous as it is, text books of acknowledged excellence might have partially contributed; nor did the language of the Reports tend, in general, to remove the error. However valuable on other points, on this they were worse than useless: information was seldom given; when given, as seldom correct.

"Thus (to omit the notice of earlier cases) in *Watts* v. *Ball*[a], a person devised to trustees upon trust to pay his debts, and subject thereto, upon trust for his two daughters as tenants in common. The eldest daughter filed her bill for a partition, when the question arising, whether the husband of the younger, having had issue by her, should be tenant by the curtesy? Lord *Cowper* decreed in the *affirmative*, observing, 'that trust estates were to be governed by the same rules, and were within the same reason, as legal estates; that as the husband should have been tenant by the curtesy had it been a legal estate, so he should be of the trust estate; and that *if there were not the same rules in all Courts, all things would be, as it were, at sea, and under the greatest uncertainty.*' These words were cited with commendation by the Master of the Rolls (Sir *Joseph Jeckyll*), in the subsequent case of *Banks* v. *Sutton*[b]; where, after some very pertinent remarks on the injustice of not permitting dower of a trust, he continued, 'that trusts and legal estates are to be governed by the same rules is a maxim which has obtained *universally*;' and after showing (what was never questioned) the partial conformity of the systems, he added, '*I believe there is no exception out of this general rule, nor indeed is there any reason there should*;' and it would be impossible to fix the boundaries, and show how far and no farther it ought to go. Perhaps in early times, the necessity of keeping thereto was not seen, or thoroughly considered.'

"Again 'the law is clear, and Courts of Equity ought to follow it in their judgments concerning titles to equitable estates—otherwise great uncertainty and confusion would ensue; and though proceedings in equity are said to be *secundum discretionem boni viri*; yet when it is asked, *vir bonus est quis?* The answer is, *qui consulta patrum, qui leges juraque servat*,' &c.[c] Such language is of frequent occurrence.[d]

"Forcible as it may seem, it yields so that of a later period. Thus in *Wright* v. *Cadogan*[e]—'There is no rule so certain, so general, and so strongly adhered to by the ablest Judges who have sat here as this, to observe *in omnibus* the the rules of law with respect to the regulation of property. *They have always been strictly observed as principles in a Court of Equity!*' And in the great case of *Burgess* v. *Wheate*[f]—'The *Forum* where they are adjudged is the only difference between trusts and legal estates. . . . . *Whatever would be the rule of law if it was a legal estate, is applied in equity to a trust estate.*' If this be not conclusive, it is difficult to say what is.

"It seemed a fair inference from such *dicta* that the tenant for life of an equitable estate may, by feoffment, &c. defeat a contingent remainder—that no jointure can be good in equity, which is not equally good at law—that trusts, whether of inheritance or of chattel interest, may be equally taken in execution—that the bargain and sale of an equity would be void without enrolment—that an equitable entail may be the subject of discontinuance. The reader can experience no difficulty in extending the argument.

"The former notion was abandoned, when Lord *Hardwicke*, though admitting 'the general rule to be to follow the same rule as the law does as to the limitation of legal estates,' qualified it in this respect, '*though not so as to enable a person owner of a particular estate to destroy the subsequent limitations by wrong.*'[g] However, in another case of frequent reference[h], it was strenuously contended by the Attorney-General, and seemingly admitted by his Lordship, that (with the exception of *dower*) the analogy between the systems was complete."

Mr. Jickling then notices the observation, that the maxim referred to, if practically true, is chronologically incorrect.

"It has been, and in general very truly, said, that Equity follows the Law—in other words, that Courts of Equity have, in most cases, endeavoured that their decisions should bear the strictest possible analogy to the decisions of Courts of Law in cases of a similar or corresponding impression.[i] But the student who may be led to investigate the subject with an accuracy proportioned to its interest, will be convinced that in many cases the law has followed equity. Nearly all the doctrines of the modern common law with respect to the transmissibility of executory interests, the assignment or *choses in action*, and the construction of deeds importing a joint-tenancy, seem grounded on the fact, that similar decisions had previously been made in Courts of Equity."

The author's design is to enquire into the extent of this analogy or discrepancy; to state the reasons on which it is founded, and the cases by which it is supported;

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[a] 1 P. Wms. 108. [b] 2 P. Wms. 718.

[c] *Cowper* v. *Earl Cowper*, 2 P. Wms. 753.

[d] See *Attorney-General* v. *Sutton*, 1 P. Wms. 765. *Atkinson* v. *Hutchinson*, 3 P. Wms. 259.

[e] *Per* Lord *Northington*, 2 Eden, 258.

[f] *Per* Lord *Mansfield* C. J., 1 Eden, 223.

[g] *Lord Portsmouth* v. *Lord Effingham*, 1 Ves. 436.

[h] *Ryall* v. *Rowles*, 1 Ves. 357.

[i] See Butl. note to Co. Litt. 390 b. sect. 15.

and to give the whole the character of a practical treatise.

In pursuance of this plan, Mr. Jickling commences his work with the Origin and Nature of Tenure, and of Uses; which is followed by an examination of the Analogy between Uses before the Statute, and Legal Estates. These disquisitions are succeeded by the consideration of the Statute of Uses, the Construction put upon the Statute, and the Origin and Nature of Modern Trusts.

The subject is then divided into two parts. The first consists of the following chapters: —

1. Application of Legal Incidents to Equitable Estates. 2. Estate of the Cestuique Trust. 3. Executory Trusts. 4. Resulting Trusts. 3. Estate and Office of the Trustee. 6. Estate of the Mortgagor. 7. Estate of the Mortgagee. 8. Money-Land. 9. Estate in Fee Simple. 10. Base Fees. 11. Estate Tail. 12. Estate Tail after Possibility. 13. Estate in Dower. 14. Jointures. 15. Estate by the Curtesy. 16. Estate for Life. 17. Estate *pour autre Vie*. 18. Estate for Years. 19. Estate at Will. 20. Estate in Parcenary. 21. Joint-tenancy and in Common. 22. Cross Remainders. 23. Estate by Entireties. 24. Estates vested in Interest. 25. Of a Possibility. 26. Contingent Remainders. 27. Executory Devise. 28. Powers of Appointment.

In the second part, the general subject of each chapter is stated as follow: —

1. Contract. 2. Fine and Recovery. 3. Bargain and Sale. 4. Covenant to stand seised. 5. Lease and Release. 6. Feoffment. 7. Exchange. 8. Partition. 9. Lease. 10. Appointment. 11. Surrender. 12. Merger. 13. Assignment. 14. Disclaimer. 15. Devise. 16. Descent. 17. Forfeiture and Escheat. 18. Involuntary Alienation. 19. Limitation of Actions.

In looking over this somewhat ponderous volume of 600 pages, royal 8vo. we have, in addition to the acknowledgment of the importance of the subject, felt no small interest in observing the labour which it appears to us the learned author has bestowed upon it. As some evidence of his industry, we may notice that nearly 2000 cases are referred to in the course of the work; and we have reason to believe that Mr. Jickling has done himself no more than justice in the following statement: —

"Whatever the defects of the following attempt, I flatter myself that incorrectness of reference will not be one of them. Great anxiety has been shown to trace every proposition to its source, to mark the distinction between knowledge and opinion; between what has been determined to be law, and what is supposed so to be.

"In conformity with this design, the adjudged cases have been consulted with an anxiety known to the author alone: and though the outline of some of the chapters has been derived from statements of an extra-judicial nature, yet the desire of perfect accuracy has induced him to compare such statements with the authorities by which they are supported. Should any exception exist, it will be found under the learning of remainders. Perhaps the names of *Fearne* and *Butler* may be some guarantee to the reader for the correctness of that portion of his work."

We heartily wish that the learning and labour thus devoted during no small portion of the life of a meritorious writer, may receive the encouragement it deserves.

STATE OF THE RECORDS AT THE ROLLS CHAPEL.

The learning and industry which, of late years, have brought to light the treasures of antiquity deposited in the British Museum, the Tower, the State Paper Office, the Chapter House, Lambeth Palace, and other places, induce us to regret that the same valuable qualities and meritorious disposition are not possessed by all the public functionaries. It reflects great credit on those who have the custody of the ancient documents of the kingdom, when, not content with discharging the duty of safe keeping, they devote their talents and leisure to arranging and classifying their stores, and thus opening to the antiquary and historian new sources of illustration and intelligence.

It is, perhaps, too much to expect that this spirit should pervade every department; and we would willingly excuse the want of the higher qualities to which we have alluded, if we could discern the performance of the humbler but necessary duties which attach to the office of record keeper. These should, at all events, be enforced with strictness; we mean the careful preservation of the documents, so that no injury reach them, and where they may at least be placed in order of date, if not according to the nature of the subject to which they relate.

We have been led to make these remarks from the extraordinary negligence which is permitted to take place in the Record Office at the Rolls Chapel, to which our attention has been lately directed by the author of "A Memoir of Sebastian Cabot, with a Review of the History of Maritime Discovery, illustrated by Documents from the Rolls, now first published." In a recent Number, *ante*, p. 176. we set forth the most remarkable of these documents, to show that the American

continent was first discovered by an expedition commissioned by Henry VII. The following is the account which the able writer of the memoir has given of the manner in which the document referred to, and others of a similar kind, are kept:—

"They are thrown loosely together, without reference even to the appropriate *year*, and are unnoticed in any index or calendar. It required a search of more than two weeks to find this patent of 3d February, 1498, although the year and day of its date were furnished at the outset."

Another document which appears in the present volume—the patent of Henry VII. to three Portuguese and others, dated 19th March, 1501, authorising them to follow up the discoveries of Cabot — has never before been published.

"This also was discovered, after a long search, not even folded up, but lying with one half of the written part exposed, and in consequence so soiled and discoloured that it was with the greatest difficulty it could be deciphered; and some words finally eluded the most anxious scrutiny. And this, of two documents indispensable to the history of maritime discovery, and for the want of which the account of these voyages has been completely unintelligible!"

"An extraordinary compensation is claimed at the Rolls Chapel on account of the trouble attending a search amidst such a confused mass. For finding the documents two guineas were demanded, in addition to the cost of copies. The applicant is informed that the charge must be paid whether the documents be discovered or not; so that the officer has no motive to continue perseveringly the irksome pursuit."

The useful labours of the Commissioners for Public Records, the vast stores which they have placed at the disposal of future writers, and liberally deposited in all the public libraries, rendering them accessible to every class of students, will, we trust, be followed by making equally available all other documents and records, wherever they may be found, and in whatsoever custody. Sure we are that no private individual can derive so much gratification by the selfish hoarding of the vestiges of antiquity, as he would enjoy from the grateful acknowledgments of the learned and ingenious, not only in this age, but in all times to come. But in vain will the munificence of individuals be exercised, if the officers in whose custody they are deposited are not compelled to discharge the ordinary duty of faithful stewards for the public. Where the records are in such a state of confusion as to warrant the charge which has been mentioned for *finding* a specific paper of which the exact date, the name of the party, the purpose and general tenour, are given, it is obvious that no private fortune would be adequate to meet the expense of a general search.

We conclude with the remarks of the author of the memoir. "The curious and important documents at the Rolls Chapel will probably one day be arranged and made available to the purposes of history. Evidence may then come forth; and it is desirable that no erroneous hypothesis should be found in the way of truth. Until that period we must be content to remain in the dark."

ON THE STATUTES RELATING TO THE EXAMINATION AND NUMBER OF ATTORNEYS.

The rapid increase which is now taking place in the number of attorneys and solicitors renders it very desirable that some regulations should be adopted to remedy the evil, and to secure (if possible) the admission only of men of competent skill and learning, and of such as by their education and station may be supposed to be placed above those temptations which too frequently seduce the ignorant and needy practitioner from the paths of honour and integrity.

When we consider the important duties which devolve upon the profession, and the confidence which is necessarily reposed in them by the public, it is surely important that, amongst the numerous changes which are now contemplated (many of which tend materially to affect their privileges and emoluments), some steps should be taken to secure to them that rank and station amongst the learned professions to which they are justly entitled.

The legislature, from the earliest times, has evinced a laudable degree of jealousy in this respect, and has endeavoured by various statutory regulations to exclude from this department of the profession all whose moral characters and legal attainments did not afford to the public the necessary security for the faithful and efficient discharge of their duties.

It may not be uninteresting, therefore, to attempt a short recapitulation of the progressive attempts made by the legislature on this subject.

The first statute which has reference to the qualifications of attorneys is that of

4 Hen. 4. c. 18., wherein it is enacted, "That all the attorneys shall be examined by the justices, and by their discretion their names put in the roll; and they that be good and virtuous, and of good fame, shall be received and sworn well and truly to serve in their offices; and in case of death they shall make another in his place, which is a *virtuous* man and *learned*."

The next legislative enactment is that of the 33 Hen. 6., passed to restrict the number of attorneys within the city of Norwich, and counties of Norfolk and Suffolk; it having been found, "That when there were no more than six or eight attorneys in the said city and counties, great tranquillity reigned therein; but then there were fourscore or more attorneys, who came to every fair, market, and other places, inciting people to attempt untrue suits for small trespasses, little offences, and small sums of debts, and the number of attorneys was thereafter restricted to six attorneys in each of the counties of Norfolk and Suffolk, and two in the city of Norwich, *to be elected and admitted by the two chief justices of the most sufficient and best instructed*."

To avoid the infinite number of solicitors and attorneys, it is enacted by the 3 James 1. c. 7., "That none shall be admitted but such as have been brought up in Courts, or well practised in soliciting of causes, and have been found by their dealings to be of skilful and honest dispositions."

The act of the 2 Geo. 2. c. 3. prescribes, that before any persons shall take the oaths thereby imposed as necessary before he can be admitted an attorney or solicitor, "The Judges of the Courts are authorised and required to examine and require, by such ways and means as they shall think proper, touching his fitness and capacity to act as an attorney." The same duties are imposed upon the Master of the Rolls and the Barons of Exchequer, with respect to such as apply to be admitted solicitors in Chancery.

Enough has been quoted, to show that if such restrictions were thought necessary at periods when learning was but partially diffused, and the law itself much less complicated than at present, how much more strictly ought they to be enforced when knowledge is so rapidly extending itself amongst all classes of the community, and the legal and commercial transactions of this country multiplied to an extent unknown to any other kingdom, either ancient or modern!

The salutary regulations enforced by the wisdom of our ancestors are now wholly neglected; nor is any enquiry whatever made as to the *legal* qualifications of the candidates for admission to the Courts of law or equity.

It is true that the Judges require a certificate that the applicant has duly served his clerkship, and that he is of good moral character, before they will grant their *fiat* for admission: but this, however, has proved totally inadequate to exclude low and disreputable characters from the profession; consequently an unjust opprobrium has attached to the *whole* body, tending to degrade them in the estimation of society.

The legislature, perceiving the great advantage which would arise to the public by the introduction of men of classical acquirements to this branch of the profession, and with a view to afford greater facilities to the graduates of the Universities in this respect, passed the act of 1 & 2 Geo. 4. c. 48., whereby "Any person who has taken the degree of B. A., or of Law, in either of the Universities of Oxford or Cambridge, or of Dublin, may be admitted to act as an attorney or solicitor after having served a clerkship of three years, instead of five, as required by former statutes."

This salutary provision, so far as it extends, is doubtless calculated materially to improve the character of the profession, if men of accredited talents and station can be induced to avail themselves of it; but so long as the greater number of professional men must be drawn from those ranks of life to whom the Universities are inaccessible, it is very desirable that some general method should be adopted, whereby the moral and legal attainments of the candidates for admission into our Courts as attorneys and solicitors should be duly ascertained.

It is well known that the candidates for holy orders, although they may be graduates of the Universities; and medical students, although they have attended the prescribed course of lectures, and otherwise complied with the rules of the Royal College of Surgeons; undergo the strictest examination before the degrees of their respective professions are conferred upon them: is it not difficult to conceive, therefore, why persons should be admitted to act as attorneys and solicitors without any enquiry being made into their fitness and capacity?

In hazarding these observations, it is not intended to reflect upon the learned Judges, or to charge them with the evils of the present system, by imputing it to any neglect of theirs; on the contrary, we confess with pride and gratitude that the country does not possess more laborious servants,

nor any who are more justly entitled to its respect and veneration.

It is true, their duties are already too important and multifarious to leave them leisure *personally* to superintend the examination of so many young men as crowd our Courts every term for admission; but some practicable method might be adopted to secure the admission of learned and virtuous men, and at the same time "*discourage and avoid the infinite number of attorneys and solicitors,*" at which there is now so much reason to be alarmed, without the necessity of imposing any additional trouble upon these learned and venerable personages.

To obviate in some measure the evils pointed out, we would venture to suggest that the Lords Chief Justices and the Master of the Rolls should be empowered to appoint a given number of attorneys and solicitors, of not less than seven years' standing of their respective Courts, who should constitute a Court of Examiners, for the examination of candidates for admission to their respective Courts as to their classical and legal acquirements. This examination might take place during three days prior to the commencement of every term, or, if more convenient, on the three days succeeding the conclusion of every term. The Court might be empowered from time to time to make rules as to the nature and subjects of examination, by notices affixed to the several Courts one whole term previous to the time appointed for examination. It would be unnecessary to entail upon the county an additional expense in remunerating such Court, as certain fees might be made payable by each candidate upon receiving a certificate of fitness from the Court of Examiners.

No attorney of less than five years' standing ought to be permitted to take an articled clerk, nor more than one at any time. And if the admission were deferred to a later period, it would afford much greater facilities to young men acquiring a competent share of learning before they entered upon their clerkship.

We have no wish to create a monopoly, or unnecessarily to depress rising talent, or to discourage honest poverty struggling for advancement in the world, either by the imposition of pecuniary qualifications or other unnecessary restrictions; but we doubt not, if regulations somewhat similar to what have been proposed could be effected, young men would be stimulated to greater diligence during their clerkships; their masters would feel it incumbent upon them to attend more minutely to the progress of their studies; and instead of employing them in mere servile occupations, as is too often the case, they would be compelled to instruct them in the *principles and science* of their profession.

The advantage to the public would be incalculable. Men of respectability and competent education would be induced to enter the profession; the intrusion of disreputable and illiterate individuals in a great measure (if not altogether) prevented; the general business of the profession would be conducted with more scrupulous fidelity; and the odium which has too often attached to the practice of the law would be entirely removed.

If these observations should attract the attention of the able and indefatigable Commissioners appointed to enquire into the state of the law, we trust they may take the subject into consideration; and if they shall be enabled to suggest any method to remove the evils of which we complain, and which are universally admitted, they will entitle themselves not only to the gratitude of their brethren in the profession, but also to the commendation of the public at large.

X.

*** This paper, which has been before us a considerable time, we now submit to our readers. We cannot say that we altogether concur in the suggestions of the writer; and we would direct his attention to the statements we have from time to time inserted, by which it will appear that the increase of the profession is by no means so alarming as has been supposed.* Instead of an influx of 1400 annually, according to the reports in the public papers, the number is but little more than 400.

In the suggestions regarding the necessary improvements in legal education, and the enquiry into the fitness of the candidate for admission, we are disposed to concur.

SUPERIOR COURTS.

ROLLS COURT.

VENDOR AND PURCHASER.—TITHES.

If an estate is contracted to be sold tithe-free, and it is proved that it is exempt from tithes by virtue of a real composition, this will be sufficient.

This was a bill filed for the specific performance of an agreement entered into, by which the plaintiff agreed to sell to the defendant a considerable estate, situate in the parish of Westcott, Gloucestershire. The property comprised in the agreement was described to be

* *Vide* p. 185. *ante*.

freehold, tithe-free, and reputed part of the manor of Comb Baskerville. The question was, whether the land contracted to be sold was in truth tithe-free. There were two facts to be established by the plaintiff. It was stated, that being parcel of the demesne lands of the manor of Comb Baskerville, as the rector, in lieu of the manorial tithes, held a certain close by way of real composition, the estate in question was tithe-free. The plaintiff was bound therefore to establish, in the first place, that there had been a legal real composition to protect from tithes the demesne lands of the manor of Comb Baskerville; and next, that the particular property sold by him to the defendant was parcel of these demesne lands. It was not enough to attempt to establish a composition real, by proving that the lands had been immemorially exempt from the payment of tithes: a real composition could only be created by a deed executed by certain parties; and to establish it, either the deed itself, or evidence of it, must be produced, from which its existence could be inferred. The question in this case depended altogether upon a verdict and judgment obtained in the year 1679, when the then rector of the parish had instituted proceedings in order to recover the tithes of wood and underwood in Gawcomb Wood. A prohibition being applied for, it appeared that a plea had been put in in the Ecclesiastical Court, to the effect that all the demesne lands of the manor were tithe-free by virtue of the composition real, and it could not now be questioned. As to the other point, in the title deeds, and in several conveyances of the estate it was described as part of the demesne lands of the manor of Comb Baskerville; "from time immemorial it had never been subject to the payment of tithes, while all the other parish lands had." His Honour, therefore, considered the plaintiff entitled to a direction, that the estate in question, being covered by the composition real, was tithe-free.—*Wynniatt* v. *Lindon*. M. R. June 2. 1831.

GUARDIAN AND WARD. — FRAUD.

Where a guardian has acted harshly to his ward, he will not be entitled to relief in equity if he has a legal remedy.

This was a bill filed in order to set aside the sale of a small copyhold property, on the ground that it was fraudulent under the following circumstances: — Mrs. Marnet, having been entitled to the copyholds in question, died in 1819, leaving the defendant, who was then a minor, her customary heir. In accordance with the desire of Mrs. Marnet, the plaintiff had acted as guardian to the defendant, who came of age in 1825. A settlement of accounts was then entered upon, when the defendant was brought in debtor to the plaintiff for money expended in repairs of the property. Payment, however, had been refused; and shortly afterwards an action was brought to recover the amount, to which the defendant made no defence, and was consequently committed to prison. Being anxious to take the benefit of the Insolvent Debtors' Act, but refusing to assign the copyhold property to the plaintiff, he was opposed at his examination, and recommitted. While in prison, however, he subsequently sold the property to a person named Carter, and then recovered his liberty by means of the Lords' Act. The object of the bill was to set aside this sale, on the ground that it was fraudulent and void.

Mr. *Treslove* and Mr. *Martin* appeared for the plaintiff.

Mr. *Pemberton* and Mr. *Wakefield*, for the defendant, said the case was one of the grossest dishonesty. The guardian brought in his ward a debtor to him, and afterwards threw him, a mere boy, into prison, for the sum which gave occasion to the bill, although that ward, having been apprenticed as a journeyman tailor, was in a very humble station in life, and the income of his property, 34*l*., being quite sufficient for his maintenance. The plaintiff had, besides, refused to accept an offer of the copyhold interest, unless upon most disadvantageous terms; and the sale in question was strictly *bonâ fide*, and resorted to to procure the defendant the necessaries of life.

The *Master of the Rolls* said, that the defendant's case was certainly suspicious, but that the case of the plaintiff was not one by any means to excite the sympathy of the Court; and as there appeared to be a legal remedy, on the ground of fraudulent assignment, he should compel him to resort to it. He should, however, allow the bill in equity to remain on the file until the result of the trial at law was known.—*Hope* v. *Mooring*. M. R. June 3. 1831.

DEVISE. — CANCELLATION.

When an annuity is left to A. *for life, remainder over, and* A. *dies in the lifetime of the testator, who then obliterates the bequest to him, the limitations in remainder will still be good.*

This case was as follows: — Shortly after the death of the testator in the cause, his autograph will had been discovered, in which he gave an annuity of 50*l*. to his brother for life, with remainder to his two daughters. The words of bequest to the brother were found to be obliterated, occasioned probably by his death prior to that of the testator; and the question now was, whether the interest given to the daughters in connection with that to their father should be confirmed.

The *Master of the Rolls* decided in the affirmative.—*George* v. *Flaxman*. M. R. June 3. 1831.

COURT OF KING'S BENCH.

(*Before the Four Judges.*)

LUNATICS. — INDICTMENT. — SURPLUSAGE.

In an indictment, under the 9 *Geo.* 4. *c.* 41. § 30., *for signing a certificate of lunacy without seeing the patient, if the act be charged as having been done "knowingly, and with intent to deceive," those words may be discarded as surplusage.*

This was an indictment preferred by the Metropolitan Commissioners of Lunatics against the defendant, who was a surgeon, under the stat. 9 Geo. 4. c. 41. § 30., for signing a certificate of lunacy without having seen or examined the patient. The jury found the defendant guilty, but

that he had no intention to deceive. The defendant was a surgeon in partnership with one Sheldon, who also signed the certificate on the 9th of February, 1830. Sheldon visited a Mrs. Woods, and being of opinion that she was a person of unsound mind, he signed a certificate to that effect, and desired her husband to bring the certificate to his partner (the defendant), who signed it; and upon that certificate she was removed to Bethnal House, Bethnal Green, being a house licensed for the reception of insane persons, and was there confined until the 17th of February. Then she was released, and was afterwards examined as a witness for the prosecution. The defendant had not seen Mrs. Woods on the 9th of February, or for a year previously. The indictment contained seven counts: as to some of them no argument was raised; but the question was, Whether the second, which charged the defendant with having signed the certificate without having seen Mrs. Woods, knowingly and with intent to deceive, was sustainable under the stat. 9 Geo. 4. c. 41. § 30., the jury having negatived the intention; or, Whether those words could not be rejected as surplusage.

Law, for the Crown, contended that the section of the statute under which the defendant had been indicted consisted of two parts; and that the second part of the clause, which made it an offence to sign a certificate without having visited a patient, did not require any intention to deceive, and it was a substantive offence without such allegation. In the case of *Rex* v. *Sainsbury*, 4 T. Rep. 457., it was held, that a magistrate might be indicted for doing an act where he had no jurisdiction, which was an offence against an act of parliament, although no corrupt motive was proved. Now, here, the defendant had, as it were, no jurisdiction; but having done an act prohibited by the statute, he might be indicted for it. This is a case where the allegation is merely formal,—a mere inference which the law supplies,—and may be rejected. (Starkie, Crim. Pl. 180.) With regard to the rejection of words, *Rex* v. *Schofield*, 2 East's Pl. C. 1029., is an authority in point. In that case, the word *feloniously* had been used in the indictment, and Lord *Mansfield* C. J. held, that the "fact appearing on the face of the indictment, by which the Court must see that the offence charged was not a felony, the word feloniously was repugnant to the legal import of the offence charged, and must be rejected as surplusage." This indictment may be read as if the words were struck through; and the jury, negativing words which do not form part of the offence, do not negative the offence itself, but the indictment remains perfect. He cited *Rex* v. *Dawson*, 5 Stark. Evid. 1586.

Platt, for the defendant. The words, "knowingly and with intent to deceive," cannot be rejected. There is a difference in stating offences against acts of parliaments and offences at common law; the latter must strictly be brought within the act under which the offence is charged. Here, it was evidently the intention of the draftsman to bring the second count within the first branch of the clause. The two offences are quite distinct. In the first, it is necessary that there should be a guilty intent; the second is merely an offence of omission. Where a prosecutor makes his election to proceed for a particular offence, he cannot be allowed to turn round and adopt another, because by rejecting particular words an offence can be made out. In all the cases cited, there is not one on an act of parliament.

Parke J. What difference is there between an offence at common law and under a statute, as to rejecting surplusage?

Platt. It is laid down by Foster, in his Crown Law, that all indictments must pursue the statutes on which they are grounded.

Lord *Tenterden* C. J. Is there any authority that, if in an indictment on a statute an offence be stated, you may not reject what is unnecessary? If the conclusion of the second count had stated any fact but that of visiting and seeing the patient, it could not have been rejected.

Littledale J. concurred.

Parke J. The second count states the certificate, and that the defendant did sign without visiting. That is of itself an offence; and it is clear that the words, "knowingly and with intent to deceive," may be rejected as surplusage; as under an indictment for murder, a party may be found guilty of manslaughter; or of simple larceny under an indictment for burglary or highway robbery.

Taunton J. Two species of offence are constituted by this clause. Where a medical man does visit, and does sign a certificate, there, if he untruly states any particular fact required by the statute, there is an intent to deceive, which constitutes the essence of the offence. Secondly, where he signs without visiting or personally seeing the patient, and the statute says nothing of an intent to deceive, there it is a substantive offence, although there was no intention to deceive. If the intention is no part of the offence, and not necessary, the introduction of those words will not vitiate the indictment. The cases of manslaughter and simple larceny are much stronger, because words are there rejected which constitute a higher offence, and induce a higher punishment. Surely, then, words may be here rejected, where they are unmeaning and unnecessary.

Judgment for the Crown.—*Rex* v. *Jones*. T. T. June 4. 1831.

COSTS.—TAXATION.—ATTORNEY'S BILL.

An attorney's Bill containing no item for business done in Court, is not liable to taxation.

On an application to direct the taxation of an attorney's bill, in which there were no *items* for business done in Court, time was taken to consult the other judges, and on the last day but one of the term,

Lord *Tenterden* C. J. said, that the judges had considered the question, and they were of opinion, that there was so much doubt as to the power of the Court to interfere in such a case that they declined doing so.

Rule discharged. *—*Anonymous*. E. T. May 7. 1831.

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* And see *Brigden* v. *Parkes*, 2 Bos. & Pul. 424. S. P.; *sed vide Dowse* v. *Cove*, 3 Bing. 20.

NOTES OF THE WEEK.

COMPENSATION OF COMMISSIONERS OF BANKRUPT.

A SCHEDULE, it is understood, is now to be added to the Bankrupt Bill, giving compensation only to those Commissioners who were appointed before Lord Lyndhurst came into office.

PROCEEDINGS IN PARLIAMENT RELATING TO THE LAW.

Mr. *O'Connell.* — In committee on the Irish Administration of Justice Bill, to move a clause to amend the law of *venue*, by enlarging the provisions of the act of 6 Geo. 4. c. 51. so as to extend the cases of bills of indictment found by the Term Grand Jury in the King's Bench, Dublin:

Also, a clause to prohibit, under a penalty, the Judge of the Court of Conscience in Dublin from entertaining any suits to enforce claims made by persons claiming or deriving title under the corporation of Dublin, or any of the Guilds thereof:

Also, a clause entitling all persons charged with any capital crime or misdemeanour in Ireland, to copies of all informations and depositions sworn against such persons:

Also, a clause entitling all persons on trial for any felony in Ireland, to make a full defence by counsel.

Mr. *Grattan.* — Bill to amend the 1 & 2 Geo. 4. c. 44., to exclude persons holding certain judicial offices in Ireland, from being members of the House of Commons.

MINOR CORRESPONDENCE.

CONTENTS OF MONTHLY RECORD.

ALTHOUGH we cannot abandon the Gazette Lists, because they are urgently required by a numerous class of subscribers, we have made arrangements for curtailing very considerably the space they occupy by the utmost possible abridgment of the matter, and by using a smaller type. The room thus gained we hope to devote to the *Biography of distinguished Lawyers*. To those who still dislike these Lists, it may be urged, as a consolation, that the time cannot be far distant when the number of bankruptcies and insolvencies will be greatly diminished; for parliamentary reform will doubtless benefit the condition of all classes of the community, and *legal* reform will complete the halcyon state of things which seems rapidly approaching.

LAW LIBRARIES.

To the Editor of the Legal Observer.

SIR,

IN the Monthly Record for July, you express your satisfaction at the forward state of the Birmingham law library; and state "that the adoption of measures like this, for the diffusion of sound legal knowledge, particularly amongst the *junior* members of the profession, promises the most unexceptionable and effective means of promoting its respectability." This induces me to trouble you with the question, whether it is not surprising that nothing of the kind is attempted in London, where, from the immense number of clerks, and in consequence of the great expense of law books, one would be inclined to think an establishment on the plan of some of our literary and scientific institutions, viz. a library, reading-room, and lectures, would scarcely fail to meet with every success, particularly if recommended by you; and, as through the medium of your amusing and useful periodical, such excellent opportunities are afforded for the establishment of such an institution.

From the interest you appear to take in the advancement and instruction of the junior branches of the profession, I trust you will, some time during the vacation, honour this subject with your attention. W. S.

*** We are not a little surprised that our correspondent should be ignorant of the existence of *The Law Institution*, the objects of which we have fully stated*, comprising, amongst many others, the very advantages required by W. S., namely, a library, reading-room, and lectures; and we can further inform our worthy subscriber, that the Institution will certainly be opened next Michaelmas term.

ANSWERS TO QUERIES.

UNCERTIFICATED ATTORNEY. P. 207.

An attorney who has practised without having obtained a certificate is expressly "made incapable to maintain or prosecute any action or suit in any Court of Law or Equity, for the recovering any fee, &c., on account of prosecuting, or having prosecuted, any action without such certificate," by the 30th section of 37 G. 3. c. 90. The section is peremptory, and contains no proviso to enable the Court to remove the disability upon certain terms — like that in the 31st section with regard to re-admission.

F. G.

LANDLORD — SHERIFF. P. 207.

1. I think that *B.*, the landlord, should bring an action *upon the statute* against the sheriff, and that he would recover the amount for which the goods were sold (exclusive of the poundage and charges of sale); but if the effects were not sold at a fair price, then for such further sum as it may appear from the evidence they were worth, not exceeding the amount of the year's rent. In practice, it is usual for the sheriff, upon its appearing evident that the goods will not sell for a sum sufficient to satisfy the year's rent, to withdraw without levying; and as in this case it appears that the goods

* 1 L. O. p. 132.

produced only half the amount of the year's rent, it must, one would suppose, have been sufficiently obvious before sale that they would not produce the sum which the landlord was entitled to claim.

An action cannot be maintained for money had and received; it must be upon the statute. *Green* v. *Austin*, 3 Camp. 260.

H. C.

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2. *F. M.* will find his queries fully answered in *Foster* v. *Hilton*, 2 L. O. p. 11., and in an anonymous case at p. 106., under the head of "Landlord and Tenant—Sheriff—8 Anne, c. 14. § 1." where the above case of *Foster* v. *Hilton* is cited.

W. S.

In the latter case, to which we are also referred by another correspondent (J. G.), the subject underwent an argument before the four Judges.

ATTORNEY. P. 199

This question is a very vague one, and an opinion upon it could only be formed from a knowledge of all the circumstances, which will probably vary in every case of the kind, so as to render it impossible to form a just conclusion without first ascertaining the motives of the attorney's conduct. It may in some cases result from sudden misfortunes; a temporary embarrassment which it might be impossible to foresee, or, if foreseen, prevent; but no one under such circumstances would say the individual was ineligible to remain on the roll. The question appears to me a very futile one, whether an affirmative or negative conclusion be arrived at, not conducive to any thing worth knowing, and more suited for legal gossip than for print.

H. C.

We agree with our correspondent that this and another Query were not sufficiently important to be inserted, and it was not till we had received three letters from the querist that we indulged him. We hope our good nature will not be over-taxed.

DECLARATIONS. P. 207.

The plaintiff may certainly declare in debt. See the case of *Foster* v. *Bonner*, Cowp. 455. cited in Tidd, 9th ed. 450., where it was laid down by Lord Mansfield, that "where a defendant is brought into Court by a bill of Middlesex upon a supposed trespass, in order to give the Court a jurisdiction, the plaintiff may declare in whatever action, or charge him with whatever injury, he thinks proper."

JOINDER. — PARTICULARS. PP. 160. 207.

Should the plaintiff comprise in his particular both a joint and separate debt, and the defendant plead in abatement, as in the case supposed by *E.*, the plaintiff would not, it seems, be allowed to recover any thing at all, according to the opinion of Lord Kenyon in the case of *Colson* v. *Selby*, E. 36 Geo. 3. K. B. 1 Esp. Rep. 452. And see Tidd, 9th ed. 600.

Y. Z.

QUERIES.

CHARITABLE USES. — ENROLMENT.

The 9 Geo. 2. c. 36. enacts, that after the 24th of June, 1736, no hereditaments shall be "given, granted, aliened, limited, released, transferred, assigned or appointed, or any ways conveyed or settled, 'for any estate or interest whatsoever' in trust for any charitable uses, unless as therein prescribed, and be *enrolled* in Chancery." In Highmore on Mortmain, p. 369, 370., under sect. Enrolment, it is laid down that the statute does not restrain the conveyance of lands to a charity in the first instance; or to future trustees for the same uses, *when once vested*. Such trustees, although they may be grantors for the purposes of such subsequent conveyances, are not *donors*, and are only requested to join in such acts, in order to prevent the land descending to the heirs at law of the last survivor. The words of the statute, 'donor or grantor,' are heresynonymous; and, as they apply solely to the benefactor, cannot be construed to restrain any such conveyance from trustees, or to require that, in order to render valid their conveyance, they should survive such act twelve calendar months." "After the first, from one or more remaining to new trustees, enrolment has not been held to be necessary, &c., but many have been enrolled for safety." In the Property Lawyer, vol. 2. p. 308., the same rule is laid down, adding, An enrolment on every transfer from different sets of trustees for the same charity is not considered necessary, although, *ex abundanti cautelâ*, instances of a second enrolment are to be found." The 9 Geo. 4. c. 85. establishes, that where land had been purchased for the benefit of such uses, and the full and valuable consideration actually paid for the same, every deed of conveyance *then made should be valid*, providing, in sect. 3., that nothing therein contained should be construed to dispense with *any of the several formalities* prescribed by the 9 Geo. 2., in relation to any deed to be thereafter made. Now, supposing land to have been settled to such uses, previous to the 24th June, 1736, and other land to have been purchased since, and the full consideration-money actually paid, and the conveyance made to the same uses by deed not enrolled; and supposing the surviving trustees to have, from time to time, conveyed both lands by the same deed) to new trustees by deeds not enrolled, it is desired to know whether it is, or not, now necessary to enrol a conveyance made by surviving trustees to new trustees, and whether any case has decided the point?

W. P. A.

RESIDUE.

A. who had two brothers, *B.* and *C.*, made her will, whereby she bequeathed to the person with whom she might reside at the time of her decease the sum of 30*l.*, out of which her funeral expenses were to be defrayed. The remainder of her property she bequeathed to *B.* About twelve months ago *A.*, from the injuries sustained by a fire, was conveyed to Bartholomew's Hospital, where she died, and *B.* was applied to and became answerable for her funeral expenses.

She died there and *B.* buried her. Is the person with whom *A.* last resided entitled to the receipt of the surplus after deducting the expenses of the funeral out of the 30*l.*? J. B.

MISCELLANEA.

SUICIDE BY A LORD CHANCELLOR.

The remarkable suicide of Charles Yorke, Lord Morden, in 1770, during the last reign, is scarcely known, and did not for many years transpire beyond the circle of a few private friends. In all the journals and periodical works of the day, his decease is recorded simply as "sudden death." The marked coolness of his brother, at whose house he called after accepting the Seals of George III., is said to have immediately occasioned his tragical self-destruction. He cut his throat on the same evening, in a paroxysm of mental suffering. The wound was not fatal; it was closed and sewed up with every probability of early and complete recovery, when his wife (a vain woman, to whose craving for a peerage her husband's political apostasy is attributed) was foolish enough to exhibit to him, in bed, the patent of his peerage; it renewed his anguish; he tore away the bandages, and died in a few hours afterwards. These singular facts are thus noticed in Mr. Parkes's *History of the Court of Chancery*: — "Lord Camden was succeeded by Charles Yorke, second son of the late Chancellor, Lord Hardwicke. The duration of his judicial power was but three days, between the 17th and the 20th of January, 1770; nor did he ever preside in the Court. The fate of this accomplished advocate will always be cited as a sad and fatal example of the evils of blending the political and judicial character. After a life of resistance to the temptation of a court, and an unvarying consistency in the constitutional principles of his party, Mr. Yorke, in an evil moment of temptation, deserted his friends and violated his principles, in accepting the seals with the title of Lord Morden. The periodical works of the day, and Walpole, in the 'Royal and Noble Authors,' record that the Chancellor died *suddenly*. It is a fact well known to many of his contemporaries yet living, that, in the bitter anguish of self-condemnation and wounded conscience, he perished by his own hand! It has been said of a similar event, 'Happily for the human race, all the extenuations which accompany such cases are reserved for the tribunal of that Being who knoweth of what we are made, and remembereth that we are but dust.' If political apostasy, which has been so often recently and unblushingly displayed, can ever be atoned for, it is when the self-degradation of the apostate is thus dreadfully confessed; showing at least a repentance commensurate with the offence. In this observation the crime of self-destruction is far from being palliated, much less defended: but it is impossible not to pity the pressure of self-degradation, however occasioned; or not to estimate a man, who, in his acute sensibilities and fatal end, showed that a momentary seduction only had overcome an honourable and noble mind."

HUMILITY OF SIR THOMAS MORE.

During the time Sir Thomas More was Lord Chancellor of England, he used to send his gentleman usher to his wife's pew, after divine service was done, to tell her he was gone; but the next Sunday after he gave up his Chancellorship, he came himself to her pew, and used the usual words of his gentleman usher, "Madam, my Lord is gone."

THE LORD CHANCELLOR.

The title of Chancellor originated with the Romans. It was adopted by the Church, and became a half ecclesiastic and half lay office. The Chancellor was intrusted with all public instruments which were authenticated; and when seals came into use, the custody of them was confided to that officer. The mere delivery of the King's Great Seal, or the taking it away, is all the ceremony that is used in creating or unmaking a Chancellor, the officer of the greatest weight and power subsisting in the kingdom. The first Chancellor in England was appointed in the reign of William the Conqueror; and, with only one exception, it was enjoyed by ecclesiastics until the time of Elizabeth, when such officers were called Keepers of the Great Seal. From the time of Sir Thomas More's appointment, which took place in the reign of Henry VIII., there is only one instance of a clergyman having been elevated to the office, namely, Dr. Williams, Dean of Westminster in the time of James I.

The Chancellor is a privy counsellor by office, and Speaker of the House of Lords by prescription. To him belongs the appointment of all justices of the peace throughout the kingdom. When the Chancellor was an ecclesiastic, he became keeper of the King's conscience, and remained so. He is also visiter of all hospitals and colleges of the King's foundation. He is patron of all livings rated under 20*l. per annum* in the King's Book. He is the general guardian of all infants, idiots, and lunatics, and has the superintendence of all charitable institutions in the kingdom. He takes precedence of every temporal Lord except the Royal Family, and of all others except the Archbishop of Canterbury. It is declared treason, by statute of Edward 3., to slay the Chancellor in his place and doing his office. In the year 1689 there were commissioners appointed for executing the office of Lord Chancellor.

LAW AND PHYSIC IN FRANCE.

It has been ascertained, from the Almanacs of the different departments, and of Paris, that there are in France no less than 1,700,843 medical men. There are, according to another calculation, 1,400,651 patients. Turning to another class of public men, we find that there are 1,900,403 *pleaders*; and upon the Rolls there are only 998,000 causes; so that, unless the 902,403 superfluous lawyers see fit to fall sick of a lack of fees and employment, there must remain 300,192 doctors with nothing to do.

The Legal Observer.

VOL. II. SATURDAY, AUGUST 20. 1831. No. XLIII.

> ——— "Quod magis ad nos
> Pertinet, et nescire malum est, agitamus."
> HORAT.

THE PROGRESS OF CHURCH REFORM.

WE have, from time to time, laid before our readers the various measures which have lately been introduced relating to church property; and we think it will not be considered unimportant or uninteresting to ascertain the exact state of this subject at the present time, and shortly to enquire what demands the public have a right to make, and how far the church and her defenders should yield to the present feeling for reform in her institutions.

The first bill introduced on the subject was that of the Archbishop of Canterbury for encouraging and facilitating composition for tithes.* By this bill power is given to the incumbent and the owners of two thirds of the lands subject to tithes to make a binding agreement for a composition in lieu of tithes for twenty-one years. This is to be effected by commissioners to be appointed for the purpose, who, if the composition money be not fixed by the agreement, are themselves to fix the proper amount. The composition money is to be allotted by assessments on the lands; and after the necessary particulars have been ascertained, the commissioners are to make an award, stating the amount of the composition money; the annual sums assessed by the commissioners; the lands on which, and the tithes in respect of which, the assessments are made; the average prices of English wheat for the seven preceding years; and the two half-yearly days on which the sums assessed are to be payable. To this composition the consent of the archbishop or bishop of the diocese, and the patron of the benefice, is necessary.

This bill was accompanied by two others†: the one to restrain and regulate the holding of pluralities by spiritual persons; the other for extending the provisions of the 29 Car. 2. c. 8. for conferring augmentations on small livings. The first of these enacts, that no person shall, after the passing of this act, hold two deaneries, prebends, canonries, &c., or two benefices with cure of souls: provided that, if they have obtained licence or dispensation, they may hold two benefices which are not more than thirty miles apart. This licence is to be given by the Archbishop of Canterbury when the joint annual value of the two benefices does not exceed more than a certain sum, not yet named, or even if they exceed this sum under certain restrictions. The other bill contains certain provisions for the augmentation of small livings, which we have already given at length.

The bill introduced by Lord Dacre‡, which has been subsequently, but we believe only temporarily, withdrawn, went a step farther. It proceeded, according to its preamble, on the principle that the payment of tithes in kind, and of temporary composition, had been found "to be productive of injurious consequences to agriculture, as well as to the moral influence of the clergy." It provided, that the owners of two thirds in value of land might apply to the quarter sessions for the appointment of commissioners, who should make all the necessary enquiries as to the value of the lands, the average price of wheat, and ascertain what annual rent would be equivalent to the value of the tithes payable for these lands; and that equivalent yearly sums should be charged on such lands, and such yearly sums should be payable quarterly to the persons entitled to the tithes. These sums were to be recoverable by distress and action. An award was to be made by the Commissioners, which was to

* See an abstract of the bill, *ante*, p. 148.

† See abstracts of them, *ante*, pp. 169. 171.

‡ See *ante*, p. 196.

be duly enrolled; and on the 29th of September, before or after the execution of the award, and as the commissioners should direct, the yearly rents or sums in lieu of tithes should commence, and all tithes, both great and small, should cease. It was also provided that, three years after the award, the owner of the tithe-rents should apply to the quarter sessions to nominate three arbitrators for ascertaining the average price of wheat for the three years then last past; and if it disagreed with the price at which the annual rent or sum was fixed, this should be altered and varied accordingly; and thus at the end of every three years for ever.

Lord Dacre's bill having thus pushed the principle of one of the Archbishop of Canterbury's bills to its fullest extent, Lord King determined to act in a similar manner by another. He therefore brought in a bill *, providing that after the passing of his act, no two or more benefices or livings, or other preferment in the church, either in England or Ireland, should be held by the same incumbent, the aggregate value whereof should exceed the sum of 500*l.*

These are the measures for church reform which have been introduced into parliament. We think Lord Dacre was right in withdrawing his bill. It will be better to pass the Archbishop's bill, and see how it answers for the time which it is intended to operate, than to pass a bill which would go to preclude all power of alteration if it was not attended with beneficial consequences. Lord King, we presume, hardly conceived that his measure would ever be adopted by the House of Lords. It was probably only introduced by way of declaring the individual sentiments of that noble Lord.

We concur therefore in the propriety of two of the bills introduced by the present spiritual head of the church; that is to say, the Composition Bill and the bill for preventing pluralities. They are moderate and temperate, and likely to be attended with great benefit to the public. We cannot, however, approve of the third bill introduced by the Archbishop — the bill for the augmentation of poor livings. It appears to us to be insufficient to ensure the ends it proposes. We are anxious to see some more powerful and effective remedy for this evil. We are, in fact, well satisfied that a greater equalisation of the property of the church among its present holders is absolutely necessary. We fully agree with the Lord Chancellor that the right of the church to its possessions is the same as that of any lay impropriator. We have clearly shown, however, in a former Number, that the legislature has the power of distributing the property of the church in such manner as it shall see fit*; and we conceive it as much for the interest and honour of the church as for the welfare of the public, that a more equal distribution of her revenues should be made. Let the strength of the church not consist in the power, wealth, and influence of her clergy; but in the veneration and numbers of her disciples. This can be promoted in no better way than by remedying the present oppressive and inefficient mode of collecting tithes, and by distributing her revenues more equally among the laborious teachers of her faith. The clergy as a body must be rendered more respectable; the means of the parish priest must be increased: it is here that reform is necessary; and this once effected, the church, firmly seated in the hearts and convictions of her disciples, will no longer have reason for alarm.

* See *antè*, p. 198.

REMARKABLE TRIALS.

No. V.

STEWART'S CASE.

In June, 1608, a youth of quality, nearly related to the royal family, namely, John Stewart, son to the Lord of Doune, and brother to the Lord of St. Colme, was tried for the murder of an individual in a very inferior station, called John Gibb, in Over Lessody, under the following circumstances. A quarrel took place between the poor man Gibb and the young gentleman's attendant groom. An exaggerated account of the matter was carried to Stewart, who was at that time engaged over the bottle. He instantly started up, and swore to bereave Gibb of his life. The company interposed, and would not permit him to leave them until he had given his faithful word that he had changed his bloodthirsty resolution. Yet so soon as he was free from the company, he rode instantly to Gibb's house, and called on the poor man in bed to rise and open the door; Gibb, knowing his voice, arose in his shirt, without the least apprehension of the evil, and on opening the door received a stab from Stewart's dirk, of which he died in forty-eight hours. It was charged that the assassin next morning showed the bloody dirk in triumph, saying, that if Gibb was the devil's man,

* See *antè*, p. 161—165.

he had got enough to quench his thirst. This case was withdrawn from the Court of Justiciary, and further proceedings therein stopped, no doubt by the royal orders. Let it be remembered, that, to inflame a race of such extreme irritability, the custom of deadly feud lent its ready assistance, — a custom which enjoined that every injury or insult received from an individual of a particular clan or name, might be honourably, if not legally, retaliated upon any other person bearing the same name, — and we have a state of manners presented to us more resembling the perpetual storm and fury of the infernal regions, than the civilised order of a Christian nation.

PRACTICAL ADVICE TO ARTICLED CLERKS.

[*From the Common-Place Book of an old Practitioner.*]

No. I.

1. ON THE MODE OF STUDY.

I. Resolve not to be disheartened by difficulties; perseverance will overcome them. There is scarcely any thing impossible to unceasing diligence, and there are few things worth having that are very easily attained.

II. Refer continually to the latest edition of the *Law Dictionary* and Blackstone's *Commentaries* for an explanation and definition of the terms which will be daily met with. These references will open the mind to a due comprehension of what is heard or read, and lead imperceptibly to the attainment of considerable legal information.

In order to prevent any terms which may have been heard or used in the course of the day from being forgotten, note them in writing as they arise, so that in the evening or morning they may be searched for, and an explanation and definition obtained from the *Law Dictionary* or Blackstone's *Commentaries*.

III. When beginning a book, read and consider the preface, and particularly the heads of the contents of all the chapters, so as to have a thorough view of the design and object of each book, and this view should always be preserved; and before beginning a chapter, read and consider the heads of the contents of the chapter. No one can read with effect unless he keeps in mind the head or principle sought to be established in the book, and in each particular chapter.

IV. Allot a certain number of pages to be read daily, and calculate the time which the book will take to read, and let nothing divert you from reading the allotted quantity. Should you be unavoidably prevented from reading the allotted quantity in one day, be sure to make up that quantity on the succeeding day. As a daily preparation to reading, work a question of some complexity in arithmetic, or a problem in Euclid. This will set the mind thinking, excite the requisite degree of attention, and ease the labour of reading.

V. Apply all your mind and heart to the subject on which you read, and be not content with reading words and turning over leaves. If you are sincerely desirous of acquiring knowledge, the greater the difficulty the greater will be the pleasure when overcome. He that is content with doing only what others do, will have more rivals than he is aware of, and these will prevent his succeeding in his profession. If he do more than is done by others, he reduces the number of his rivals, and his success is more certain.

VI. The law is not so complicated as is generally conceived. Most of the difficulties in the administration of justice arise out of disputes as to the facts and circumstances of each particular case, which each party is inclined to bend to suit his own interest. Hence the important part which a solicitor and an advocate has to perform, is to collect, investigate, and nicely to discriminate and arrange the facts, dates, and circumstances of his case in such exact order and method so that they may flash conviction to the mind of those to whom they are to be submitted.

VII. Order and *method*, therefore, as well in acquiring a knowledge of the profession as in the practice of it, must be placed in the foremost ground, and is absolutely necessary to be observed and attended to; and with a view to acquire a *habit* of order, let every thing, even the most minute and unimportant, be done regularly and systematically.

Mr. Butler states in his *Reminiscences* that he was enabled to accomplish what he did by —

1. Early rising.
2. Systematic division of his time.
3. Abstracting himself from all company and from all diversions likely to interest him highly.
4. Avoiding reading, writing, or thinking on modern politics.
5. Directing his attention to one object at a time.
6. Reading the best book on a subject, and consulting others as little as possible;

but when the subject was controversial, reading the best book on each side.

7. Finding out men of information, and when in their company listening, and not talking.

2. AS TO THE ACQUIREMENT OF METHOD AND THE KNOWLEDGE OF TERMS.*

For certain hours in the mornings very early, and for certain hours at other parts of the day (when not in business), the student should read Watts's *Logic* with anxiety and with earnestness; and in order to make himself master of it, he had better lay down a plan as to the number of pages to read and reflect on daily, and as to the time when he should so read and reflect; and after having formed a plan, he should inflexibly adhere to it, and suffer nothing to interfere with or defeat it.

The business of an attorney, and the knowledge to be obtained of the profession, depend entirely on method and precision; and therefore whatever the student does or reads should always be done and read methodically and orderly. In every thing, therefore, be it what it may, he will do wrong if he does not observe most strictly method, order, and precision. Logic is excellently well calculated to produce method and order in our thoughts, words, and actions; and therefore before the student enters upon reading let him first learn, through logic, the method of thinking and of examining knowledge. A slight superficial reading of words will not do either in logic, law, or any thing else.

Much confusion arises in the mind from not knowing the meaning of certain terms or words which are to be met with in reading, conversation, and copying. Let it be therefore a most important part of his duty to himself and to his principal always to *note down* what terms or words he meets with and does not thoroughly understand; and the first moment he conveniently can, let him search for and investigate an explanation and the meaning of such terms in Jacob's *Law Dictionary* or other work, not relying upon or resting idly contented (as many idle young men do) with enquiries and answers which he may make or receive from any one. While searching for the explanation he wants, he will necessarily make himself master of many others which he never thought or heard of. This recommendation applies to every subject.

If a solicitor or his clerk do not *look forward and consider beforehand* what business he has to do, and when a step is necessary to be taken in it, and arrange the mode of doing it, he will soon be thrown into disorder and confusion, and unable to do what is necessary to be done when the time arrives for doing it, or, what is still worse, he will wholly forget and neglect it. Indolence, ignorance, or indifference will generally be found to be the character of the solicitor or his clerk, who is thus thrown into disorder or confusion, or who thus forgets or neglects his business. Beware then of deserving such a character.

One of the strongest proofs of diligence and attention in a clerk, and of his having a real interest in the business and character of the office, is that of being constantly alive to what is necessary to be done, and of doing it without waiting until it be pointed out or required to be done. When the attention of a principal is drawn to a business, and he finds it done, how different are his feelings to what they would have been if not done! To do only that which is pointed out or directed to be done, is the conduct pursued by those void of reason or reflection. Study, then, to anticipate the wishes and wants of your principal, and act accordingly.

A solicitor's office will acquire a character, and his clients will be more or less pleased and satisfied, according to the despatch and punctuality observed in it, and to the zeal and energy displayed in the transaction of business. Every business, therefore, should be pursued with zeal and energy, and not in a cold, careless, or languid manner; and in doing this the solicitor and his clerks cannot but manifest in all their actions and movements a life and spirit which will overcome all difficulties, and throw around the office cheerfulness and activity.

* In this paper there appears some repetition of part of the preceding; but the advice is so good that it will bear being presented again in a different light.

DISTRESS OF CATTLE DAMAGE FEASANT, REPLEVIN, &c.

We have received a short statement of a case which, if unaccompanied with remarks, would find its place in the appropriate department of "Queries;" but our correspondent has discussed the subject, and quoted several authorities; we are therefore induced to lay it before our readers as a distinct article, for the consideration of such of them as are familiar with the branch of law to which it relates. It is as follows:—

A. distrains the cattle of *B.* damage feasant, and impounds them before *B.* makes any tender of amends. The damage really done cannot

amount to more than 20*s.*; but *A.* demands 10*l.*, which *B.* of course refuses to pay. Under these circumstances, what is *B.*'s remedy?

In the case of *Anscombe* v. *Shore*, 1 Camp. 285., which was an action on the case by plaintiff to recover 5*l.* 5*s.*, which he said he had been compelled to pay to obtain the restoration of a cow impounded for damage, for which 10*s.* was sufficient compensation, and which sum he had tendered to defendant *after the impounding*, *Mansfield* C. J. held the action would not lie, and that the only course to recover the cattle was by suing out a replevin. It was well replied by plaintiff's counsel, that he could not maintain replevin, having no sufficient plea in bar to defendant's avowry; and that if defendant had asked 100*l.*, plaintiff must have paid it or abandoned his cattle. But the Court nonsuited the plaintiff without explaining his remedy.

In a note to the report of the case is a quotation from Lord *Coke*, to show that a person whose cattle are rightfully distrained is not entirely without remedy if the distrainor refuse to accept reasonable amends tendered after the impounding, as follows:—

"Note, reader, this difference;—that tender upon the land before the distress, makes the distress tortious; tender after the distress, and before the impounding, makes the detainer, and not the taking, wrongful; tender after impounding makes neither the one nor the other wrongful, for then it comes too late, because then the cause is put to the trial of the law to be there determined. But after the law has determined it, and the avowant has return irreplevisable, yet if the plaintiff makes him a sufficient tender, he may have an action of detinue for the detainer after; or he may, upon satisfaction made in Court, have a writ for the delivery of the goods."

Now, in the case proposed by me, I wish to know, if it is seriously proposed to *B.* as his remedy, that having failed to make tender of amends to *A.* before the impounding, about which he might know nothing till it was completed, he must, rather than submit to *A.*'s exorbitant estimate of damages, sue out a replevin, and carry it to trial at law, where, having no sufficient plea in bar to the avowant, he must inevitably become subject to the costs of the trial, by statutes 7 Hen. 8. c. 4. § 3. and 21 Hen. 8. c. 19. § 5.; and that after the avowant *A.* has return irreplevisable awarded to him, then *B.* may make his tender; and, if refused, sue for the detainer subsequent. Such a remedy is worse than the disease. To save an overcharge of 10*l.* *B.* incurs, as his only alternative, 50*l.* or more for costs of trial of the replevin. I shall be glad to know whether the law gives *B.* any more satisfactory remedy? O.

EXPENSE OF PRIVATE SEALS.

To the Editor of the Legal Observer.

SIR,

THE perusal of this day's Number of the Legal Observer has reminded me of an intention, which I have long entertained, of addressing you upon the subject of the *last seal*, and the really absurd and useless expense to which the closing of the seal exposes parties who have occasion for any writs requiring the sanction of a real as well as an almost nominal application of the seal in the interval between the last seal of the Trinity term and the first seal before the succeeding Michaelmas term. It is well known to every professional man, that the fee paid for what is called a private seal upon every commission of bankrupt in the interval above mentioned is 2*l.* 2*s.* 6*d.*, while the Chancellor continues in London; but if he should be absent, the fee varies from 5*l.* to 50*l.*, according to the distance at which he may happen to be residing, and the number of writs sent to him for seal at the same time. The fees for private seals also extend, in a less degree, to every other writ under the control of the Great Seal. There appears to me to be no reasonable ground for upholding the system of private seals, at all events, during the Chancellor's sittings; and even after they close, it cannot be denied that it is a most grievous burden upon the public, that they should be compelled to pay so large a sum for the use of a seal which is held by the Chancellor for their benefit. It has always appeared to me to be an anomaly, that a man having the misfortune to require a writ in August, September, and October, should be compelled to pay so much more for it than in any other month in the year. To a man not in the profession, the thing must appear inexplicable.

It may, and no doubt will, be said that, as the system has been adopted for ages, and sanctioned by every succeeding Chancellor, it would be hard to deprive the present Chancellor of these emoluments of his office; but I think it is not putting his professions to too severe a test, to require from him a removal of such disreputable fees. He can never defend the fees upon the principle of established usage, since he has no objection to innovation upon more trifling occasions.

I admit that the Chancellor must have a large income, but let it not be obtained from such miserable sources. If it be necessary to supply the deficiency of income occasioned by the removal of these fees, let it be done by government, and I think no reasonable man could object to this arrangement. It is not right that the Chancellor of England should be compelled to resort to the oppressive means of private seals for the support of the dignity of his office.

Trusting that you will, by some means or other, bring the subject of this letter under discussion,

I am, Sir,

Yours obediently,

Saturday, Aug. 13. 1831. A. B. C.

MEDICAL JURISPRUDENCE.

No. IV.

INSANITY.—LIABILITY OF LUNATICS ON CIVIL CONTRACTS.—ANNULLING MARRIAGE.

WE resume our selections from the valu-

able Lectures of Professor Amos, at the London University.*

The Professor, after referring to his previous Lecture, stated that the subject of the liability of lunatics for their civil contracts had been very much cleared by two late decisions of Lord Tenterden, though the law still remained in some points unsettled.

The first was in the case of *Baxter, a tradesman* v. *the Earl of Portsmouth*. A verdict had been found for plaintiff, but the defendant had leave to move to enter a nonsuit, on the ground that he was a declared lunatic; and a rule *nisi* for that purpose being applied for, his Lordship decided as follows:—

"I was of opinion at the trial that the evidence given on the part of the defendant was not sufficient to defeat the plaintiff's action; it was brought to recover charges for things suited to the state and degree of the defendant, and actually ordered and enjoyed by him. At the time when the orders were given and executed, Lord Portsmouth was living with his family, and there was no reason to suppose that the plaintiff knew of his insanity. I thought the case very distinguishable from an attempt to enforce a contract not executed, or one made under circumstances which might have induced a reasonable person to suppose the defendant was of unsound mind. The latter would be cases of imposition; and I desired that my judgment might not be taken to be, that such contracts would bind, although I was not prepared to say that they would not. Upon further consideration, I find no reason for thinking that my direction to the jury was erroneous, or that the verdict should be disturbed." Rule refused.—*5* Barn. & Cres. 172. And in the case of *Browne* v. *Joddrell*, on a similar plea being offered for the defendant, his Lordship expressed himself in these terms:—"I am not unwilling to receive the evidence offered; I think, however, the defence will not avail, unless it be shown that the plaintiff imposed on the defendant. The old cases go the length of saying that a party shall in no case be allowed to set up his own insanity. That, I think, is too general a rule: if you can show that any means were used to impose upon a person of weak or unsound mind, I think that in this, as in all other cases of fraud, it is an answer. I once acted on this rule, and my opinion was confirmed by the Court." Verdict for the plaintiff.—1 Moo. & Mal. 105.

A person who has been a lunatic, has been allowed, after recovering his reason, to avoid a marriage made whilst he was a lunatic; and this, although there had been no commission of lunacy taken out against him. I will read a little of this case, as showing the opinions of the Ecclesiastical Courts as to what degree of insanity will avoid a marriage.

"*Turner* v. *Meyers*.—This was a case of proceeding to annul a marriage, on the plea of insanity, instituted on the part of the husband after his recovery. *Sir William Scott*.—This is a suit brought by a man to set aside his marriage on the ground of his own incapacity at the time alleged, though at other times he is pleaded to have been capable. The suit was first brought by the father; but the son being of age, and there being no means of making the father guardian, or *curator ad litem*, the Court was of opinion that the suit could not proceed in that form. It has, therefore, since assumed its present shape. It is, I conceive, perfectly clear in law, that a party may come forward to maintain his own past incapacity, and also that a defect of incapacity invalidates the contract of marriage, as well as any other contract. When a commission of lunacy has been taken out, the commission against the marriage will be founded on that statute; where there has been no such commission, the matter is to be established on evidence. The statute has made provisions against such marriages, even in lucid intervals, till the commission has been superseded. In other cases, the Court will require it to be shown, by strong evidence, that the marriage was clearly had in a lucid interval, if it is first found that the person was generally insane. Madness is a state of mind not easily reducible to correct definition, since it is the disorder of that faculty with which we are little acquainted; for all the study of mankind has made but a very moderate progress in investigating the texture of the mind even in a sound state. In disease, where it has pleased the Almighty to envelop the subject-matter in the darkness of disease, it will probably always continue so; but the effects of this disordered state are pretty well known. We learn from experience and observation all that we can know, and we see that madness subsists in various degrees; sometimes slight, as partaking rather of disposition or humour, which will not incapacitate a man from managing his own affairs, or making a valid contract. It must be something more than this, something which, if there be any test, is held, by the common judgment of mankind, to affect his general fitness to be trusted with the management of himself and his own concerns. The degree of proof must be still stronger, when a person brings a suit on allegation of his own incapacity, by exposing to view the changes of his mind. This gentleman's father has been produced as a witness, that he had given him leave to go to a show of cattle, in order to amuse him; that he (the plaintiff) took that opportunity of eloping to town without money and without preparation; that he told his friend he was going into the neighbourhood of Nottingham, and should return, but he did not: he went to Newark, and on to London, without any other purpose than that of indulging the military notions which he usually entertained in his fits of insanity. He is described, by one of the passengers in the same carriage, to have been giddy and flighty; very communicative about his family, as persons of property, but frequently contradicting himself; speaking to every person whom he met, and particularly to women, and calling to any person that he saw at the window.—This witness deposes, that at first he supposed him only to be wild and thoughtless, but after-

* *Vide* Medical Gazette, July 6. 1831.

words he considered him to be deranged. This is a description of very extravagant behaviour. On his coming to town, on the 9th of September, he met this lady for the first time, as it is admitted by Mrs. Turner in her answers, who was then Sarah Meyers, but passing by the name of Mrs. Lee. He first became acquainted with this woman, by accidentally meeting her in the street, somewhere near one of the Theatres Royal. Her servant, Susannah Squire, says, 'that on Friday, the 9th of September, he came with her mistress, who lived in Ann-street East, and that almost immediately she heard him say to her mistress, 'he could not live without her.' That her mistress then proposed 'that she should go to church with them;' and on the Monday following Mr. Turner obtained a licence, and on Wednesday they were married.' Here is an offer of marriage at once to a perfect stranger. One has heard of the extravagant effects of love at first sight. This is conduct which, if it stood alone, might be only an act of a very weak person, and might not be sufficient to proclaim a man absolutely mad or lunatic; it is, certainly, however, symptomatic; and if fortified by other acts, may lead to a different conclusion. It is alleged, on the part of Mrs. Turner, 'that she was the cause of this inclination, on his discovering that she was particularly fond of the military profession, from seeing the locket of a military officer in her possession; and that he affected their habits from a wish to recommend himself to her.' But this could not have been the cause of them, since they appeared in his first conversation with Mr. Parry, before he had seen her, and with his fellow-traveller on the road. Mr. Parry, jun. says, that the next day a young woman came to enquire about his character, with a card of reference of a description very wild:—'Royal Army of France, Captain Jonathan Turner, of the Royal Guards.'

"Oakley, the sister of the woman, says, 'that on the Monday he was very desirous to marry her sister; that he went for the licence, and was married; and that, during the ceremony, there was perfect propriety of behaviour; and that he was perfectly rational, and that it was his own free act.' The clergyman and the clerk also depose to the propriety of his behaviour. Much stress, however, is not to be laid on that circumstance; as persons in that state will, nevertheless, often pursue a favourite purpose with the composure and regularity of apparently sound minds. It is in *the extravagance of the act itself*, rather than in *the manner of pursuing it*, that the proof of *madness* is to be discovered.'"
—1 Hag. 414, &c.

To this I should add a case of a proceeding under a commission of lunacy to set aside a marriage.

"*The Countess of Portsmouth*, v. *the Earl of Portsmouth*; *by his Committee*.—This was a suit of nullity of marriage, instituted originally in the Consistory Court of London, on the part of the Earl of Portsmouth, acting by his committee; and in an early stage of the proceedings, came up, by appeal, to the Court of Arches, where it was retained. The cause was argued by *Lushington* and *Pickard* for the Earl of Portsmouth; and by the *King's Advocate* and *Dodson contrà*.

"Sir *John. Nicholl*.—This suit is described as brought by the Earl of Portsmouth, acting by his committee, against Mary Ann Hanson, falsely calling herself Countess of Portsmouth, to have a marriage, in fact, solemnised between them, declared to be null and void in law. The proceedings originated in the following circumstances. In January, 1823, a commission issued to enquire into the alleged lunacy of Lord Portsmouth; the inquisition was executed, very long proceedings took place, the matter was strenuously contested, a great number of witnesses were examined, and the finding of the jury was, 'that Lord Portsmouth is of unsound mind, so that he is not sufficient for the government of himself and his property, and has been in the same state of unsound mind from the 1st of January, 1802.' In consequence of this finding, Mr. Henry Fellowes, a distant relation, was appointed committee, and by an order made in the Court of Chancery, the committee was directed to institute proceedings in the Ecclesiastical Court 'for the purpose of annulling and declaring void the marriage of John Charles Earl of Portsmouth with Miss Mary Ann Hanson, now Countess of Portsmouth.' Thus the proceedings commenced in the Ecclesiastical Court. The verdict would not of itself affect the validity of the marriage, *de facto* solemnised, though solemnised within the time of the finding by the jury. The finding is a circumstance and a part of the evidence in support of the unsoundness of mind at the time of the marriage, but no more; for this Court must be satisfied by evidence of its own that grounds of nullity existed. The law of the case admits of no controversy, and none has been attempted to be raised upon it. When a fact of marriage has been regularly solemnised, the presumption is in its favour; but then it must be solemnised between parties competent to contract—capable of entering into that most important engagement, the very essence of which is consent; and without soundness of mind there can be no legal consent—none binding in law: insanity vitiates all acts. Nor am I prepared to doubt, but that considerable weakness of mind, circumvented by proportionate fraud, will vitiate the fact of marriage—whether the fraud is practised on his ward by a party who stands in the relation of guardian, as in the case of *Harford* against *Morris*, which was decided principally on the ground of fraud—or whether it is effected by a trustee procuring the solemnisation of the marriage of his own daughter with a person of very weak mind, over whom he has acquired a great ascendancy. A person, incapable from weakness of detecting the fraud, and of resisting the ascendancy practised in obtaining his consent to the contract, can hardly be considered as binding himself in point of law by such an act. At all events, the circumstances preceding and attending the marriage itself may materially tend to show the contracting party was of unsound mind, and was so considered and treated by the parties engaged in fraudulently effecting the marriage. In respect to Lord Portsmouth's unsoundness of mind, the case set up is of a mixed nature—not absolute idiotcy, but weakness of understanding—not continued insanity, but delusions and irrationality on par-

ticular subjects. Absolute idiotcy, or constant insanity, would have carried with them their own security and protection; for, in either case, the forms preceding, and the ceremony itself, could not have been gone through without exposure and detection: but here a mixture of both, by no means uncommon, is set up—considerable natural weakness, growing at length, from being left to itself and uncontrolled, into practices so irrational and unnatural as in some instances to be bordering upon idiotcy, and in others to be attended with actual delusion — a perversion of mind — a deranged imagination — a fancy and belief of the existence of things which no rational being, no person possessed of the powers of reason and judgment, could possibly believe to exist. His servants were his playfellows in town and country; he played all sorts of tricks with them; more particularly in the country, where he was less under observation — where he found additional playmates in his farm-servants and labourers, and where he was less liable to notice. He was fond of driving a team, and Lady Portsmouth so far indulged him as to have a team of horses kept for his amusement as a toy and a plaything, with which he carted dung, and timber, and hay; yet he used to flog these horses most unmercifully, and often in such a manner as to produce danger to his own person. As further proof of his unsoundness of mind may be added his propensity for bell-ringing — not, as sometimes young men will do, for exercise, but to share the money; this, too, by a nobleman of forty, at his own parish church, and near his own residence: his fancy respecting funerals, and his conduct and all the circumstances connected with that fancy: the slaughtering of cattle, and the incidents attending that whim. Another trait is, his pleasure in malicious cruelty to man and beast; never expressing any regret — but 'serves him right,' was his usual remark upon his own acts of cruelty. I allude only to these facts very generally; but to state them with the force and effect they have upon my judgment, would require a detail of the minuter circumstances connected with each of them. A still more decided delusion of mind is that relating to lancets, and tapes, and basins in women's pockets; the particulars of which, for the same, and even for additional reasons, I do not enumerate. The fact is proved beyond all question; it was a delusion that continued even to the time of the inquisition. Dr. Ainslie admits that 'such a propensity is not consistent with a perfectly sound mind.' What the distinction is between a mind not perfectly sound, and an unsound mind, is not explained by the witness; nor what is the state of the capacity of a man who, when between forty and fifty, twice married, and living in society, supposes that the gestation of a woman could be fifteen months; nor of one who admits that he knew another man was in bed with his wife — that he remonstrated, but 'they never took any notice of me,' — and who does not resent this, nor take any steps for relief, because the man was 'too strong' for him; — these, and other circumstances, admitted on the interrogatories by this witness, occasion his evidence to produce no alteration in my opinion, respecting the bearing of the facts before the marriage spoken to by the other witnesses; and the evidence of Swait, the bailiff, who is brought forward to contradict the facts, and to prove the correctness and propriety of Lord Portsmouth's conduct, is equally nugatory; for this witness, on the interrogatories, admits — 'That he did sometimes control the noble Earl;' that 'when he was running a little contrary, he threatened to tell Dr. Garnet of him.' — 'Respondent has sometimes wrested a whip out of Lord Portsmouth's hand, when my Lord, in playing, has cut him across the legs.' What a picture is this of the noble Earl, from a witness produced to prove his capacity and soundness of mind! A nobleman of forty, flogging an old bailiff of sixty for his amusement, and, in play, cutting him across the legs! — the bailiff not submitting nor quitting his service, but by force wresting the whip out of his hands! and the nobleman, in his turn, submitting to this indignity and forcible control!" — 1 Hag. 2d Ser. 355, &c.

The most perplexing cases with respect to the question of the kind of insanity which will avoid civil contracts, is where there is partial insanity and delusion upon some particular subjects; and where the delusion is not so *immediately connected with the act* which is sought to be invalidated as, if it were a criminal act, would render the doer of the act irresponsible from punishment. I shall read you a case.

Dew v. *Clark and Clark.* Judgment: — Sir *John Nicholl.* — "The question in this case respects the validity of the will of Ely Stott. He died on the 18th of November, 1821, at the age of 72 years. He left behind him a widow, and an only daughter by a former wife. He had several nephews and nieces, but, of course, none of them were entitled in distribution. His property amounted to near 40,000*l.* In the month of February, 1821, the wife applied for a commission of lunacy against the deceased, which was granted and executed, and the deceased was found of unsound mind from the preceding 1st of January. The will propounded bears date in the month of May, 1818 — three years before the finding under the inquisition. — The disposition (according to the document) is very much to the prejudice of the daughter, who, out of this large property, has merely an annuity for life of about 100*l.* But this will was fully and formally drawn up, was regularly executed, and attested by three respectable witnesses. Soon after the death of Mr. Stott, all the executors having renounced probate, administration, with the will annexed, was taken by the residuary legatees — Thomas and Valentine Clark. Not long after, *viz.* in the month of April, 1822, the administration was called in by the daughter and only child. The will was propounded by the residuary legatees, and opposed by Mrs. Dew, the daughter. The first allegation given for the executors, pleaded merely the *factum* of the will, and the death, character, and handwriting of one of the attesting witnesses. In support of this allegation the two surviving witnesses were examined, and the *factum* was proved. In particular, Mr. Bramley, the solicitor who prepared the will, proves instructions from the deceased himself; several interviews with him; the different stages of the

preparation; and, finally, the regular execution. Both witnesses, Bramley and Hammond, speak to their conviction and belief that the deceased was of perfectly sound mind when he made this will. If the case rested upon the evidence of the *factum*, as proved by the witnesses on the *conditit*, there could be no doubt nor question upon the case. The ground on which the will is opposed, is not a denial of the instructions and execution; is not a suggestion of any fraud or circumvention, nor of any extrinsic influence: it is not alleged, that the will did not originate with himself, was not prepared and completed by his direction, nor that the attesting witnesses have misrepresented the facts, nor that they have not given an honest opinion of the state of the deceased; but the ground is, that though the will is the mind of the deceased, yet that it was not a sound but an unsound mind — unsound in the legal acceptation of the epithet — 'deranged and insane.' The clear rule of law is, that the burthen of proof in such a case lies on the party setting up insanity ..... As far as my own observation and experience can direct me, aided by opinions and statements I have heard expressed in society, guided also by what has occurred in these and in other Courts of justice, or has been laid down by medical and legal writers, the true criterion is — where there is delusion of mind there is insanity; that is, when persons believe things to exist, which exist only, or, at least, in that degree exist only, in their own imagination, and of the non-existence of which neither argument nor proof can convince them, they are of unsound mind; or, as one of the counsel accurately expressed it, 'it is only the belief of facts, which no rational person could have believed, that is insane delusion.' This delusion may sometimes exist on one or two particular subjects, though, generally, there are other concomitant circumstances — such as eccentricity, irritability, violence, suspicion, exaggeration, inconsistency, and other marks and symptoms which may tend to confirm the existence of delusion, and to establish its insane character..... The law, then, does recognise partial insanity in the sense already stated; and, in civil cases, this partial insanity — if existing at the time the act is done; if there be no clear lucid interval — invalidates the act, though not directly connected with the act itself; but, in criminal acts, it does not excuse from responsibility, unless the insanity is proved to be the very cause of the act. The rule, as I apprehend, was correctly laid down in *Hatfield's case*: — 'There is a wide distinction between civil and criminal cases. If, in the former, a man appears upon the evidence to be *non compos mentis*, the law avoids his act, though it cannot be traced or connected with the morbid imagination which constitutes his disease, and which may be extremely partial in its influence upon conduct; but to deliver a man from responsibility for crimes, above all for crimes of great atrocity and wickedness, I am by no means prepared to apply this rule, however well established when property only is concerned.' ..... There is a large mass of evidence introduced properly, and certainly of considerable weight, but which does not require to be stated, nor examined in detail; namely, evidence to show that the deceased, *in the ordinary transactions of life, conducted himself and his affairs rationally;* was a sensible and clever man; amassed a considerable fortune by his profession; took good care of his property; and that several of his friends and acquaintance, some of them medical persons, never considered, or even suspected, that he was deranged in his mind. All this is fully established; and it strengthens the presumption of sanity, and requires that the proof of derangement should be very forcible and stringent; but it is not conclusive, nor is it even conflicting evidence. All this may be *true, and yet delusion on particular subjects, and showing itself on particular occasions, might exist.* It is, therefore, not necessary to discuss this part of the evidence with the same minuteness which might be required, in order to compare it with conflicting evidence; yet the parties supporting the will are entitled to the benefit of it, and shall have its full force in my decision. ..... The main delusions, certainly, are those respecting his daughter and respecting himself; — so that though his daughter, from her earliest infancy to the end of her history in this cause, is proved to be amiable in disposition, of superior natural talents, engaging in her manners, diligent, industrious, submissive and obedient, patient under affliction, dutiful and affectionate, modest and virtuous, moral and religious, yet, in the deluded mind of the deceased, she is the most extraordinary instance of depravity, of vileness, of vice, of crime, of profligacy, of hypocrisy, of artifice, of disobedience, of revolt and rebellion against paternal authority, and is quite irreclaimable; — while, in regard to himself, he is a pattern of fatherly tenderness and affection, though tying his daughter to a bed-post, and flogging her with the most unmerciful severity, and aggravating her sufferings by the application of brine; flogging her repeatedly with a horsewhip; pulling her hair out by the roots; compelling her to perform the most menial drudgery, and of the severest sort — to which even a servant would not submit. All these things are represented by himself as proofs of his great tenderness and regard. These impressions accompany him through life, and are recorded in this will. To remove these delusions, no reasoning, no argument, no interposition of friends, no pastoral authority, is of any avail; even the sanctions of religion cannot convince him that his ideas are erroneous, nor induce him to alter his conduct: he held himself perfect and faultless, — 'pure as the Deity.' What might be the condition of the deceased as applied to other transactions, civil or criminal, it is not my duty to consider." — Hag. Rep.

I will contrast with this another case, where the bond executed by a person who appeared to be evidently deranged *upon some subjects*, was upheld as valid and effectual. Perhaps the distinction may be that no delusion was proved to be operating on the party's mind at the time of the action in question. The case to which I allude occurred at *Nisi Prius* in the King's Bench, 1809. It was an action on an annuity-bond brought by a Miss Faulder against the executors and heirs of Thomas Clerk Jervoice:

the defence, lunacy of the obligor. The young lady had been the mistress of Mr. Jervoice from the age of eighteen, cohabiting with him for twelve years, and conducting herself throughout with singular propriety, and paying every possible attention to his welfare. When he executed the bond in her favour, he did it with peculiar caution, and the preparers of the instruments and the attesting witnesses bore strong testimony to his competency for the act. The bond bore date 1808. The following facts were adduced in evidence by the defendants:—The lunatic, on the death of his grandmother in the year 1802, became possessed of an estate in Hampshire, whither he immediately repaired, and whilst the corpse was yet unburied, pulled down the chimneys and levelled the walls of the mansion, himself living in a marquee, sleeping in a stable or a summer-house, and cooking his victuals with his own hands under a tree in a favourite vessel, which he called his *conjuror*. The carriage of his grandmother was painted black, by his directions, and exposed for sale under the name of Black Jack. Upon the death of his father, he came into the possession of the family estate and residence, situated at West Bromwich, in Staffordshire, whither he repaired, and made a bonfire of all the furniture, himself superintending the conflagration. It was his practice to ride about the country on a jackass, dressed in a white hat, blue trowsers, red morocco slippers, with a flannel shirt next his skin, and over that a white linen shirt, without either coat or waistcoat, wearing sometimes a wagoner's frock. His usual places of residence were tents, stable-yards, or coach-houses, where he cooked his victuals, and even shaved himself, in his beloved *conjuror*, occasionally sleeping on the boards of a parlour, or the stones of a hall. Much of his time was spent in travelling—his carriage being always filled with pots, pans, silver plates, old china, a bunch of large keys, picklocks to the number of one hundred and fifty, and his inseparable *conjuror*. A carriage which he once made use of was unpainted, until a sudden freak induced him to order three female domestics to paint it on a Sunday, and then he rode out in it, the paint being wet. Fishwomen were frequently called to him as they were passing by, whose fish he purchased, and whom he employed in mending the lining of his carriages with the petticoats of his maid-servants. His female domestics, particularly a woman of the name of Elizabeth Savage, whom he picked up at Birmingham, were the companions of his journeys; and he would frequently stop at night on the high roads, making tea and cooking his victuals: on one occasion he performed the process of cooking at midnight on Bagshot Heath, with numerous candles burning round him, to the no small surprise and entertainment of travellers. Staircases became the objects of his aversion, for he thought them unsightly things; and causing the staircase of his house at Egham to be taken down, substituted a ladder in its stead; passages were moreover cut through the ceilings, through which his servants were sometimes obliged to raise themselves into their chambers by ropes and pulleys; himself occasionally sleeping on the boards of the ground-floor. To his own chamber (when he made use of one) he clambered by means of a chest of drawers filled with large nails drawn out progressively like steps, from the top of which he ascended by ropes. In one of his houses a staircase turning on castors was erected, to serve as a crane, for the purpose of raising his carriage into his chamber windows. Windows were frequently converted into doors, and the doors blocked up. At length he conceived an aversion to the presence of servants; and, to obviate their attendance, caused the door leading to his chamber from below to be cut in two, so as to form a bar, over which his domestics were never allowed to pass; but they placed his victuals on a table in the inside, connected by a rope and pulleys with that on which he was sitting, and thus were his victuals conveyed to him.

The Rev. Holwell Car deposed, that he visited Mr. Jervoice about the time of his granting the annuity, and thought him at that time incompetent to a legal disposition of his property. He was confined in a madhouse on the 2d of January, 1809, where he continued to the day of his death. Lord Ellenborough observed to the jury, that although the inquisition which found Mr. Jervoice a lunatic during the period when the instruments in question were executed, was evidence of his insanity, yet that such evidence was presumptive only, not conclusive; and if they should be of opinion, that when he granted the annuity he had such possession of his intellects as rendered him perfectly aware what he was doing, and in making such a disposition of his property had followed the dictates of his mind when fully possessed of reason, their verdict should be in favour of the annuity: provided, on the contrary, they believed him to have been, during the whole period covered by the inquisition, in a state of decided insanity without any lucid interval, the defendants were entitled to a verdict.—Verdict for plaintiff.—*Law Magazine*, No. VII.

ON THE RIGHT OF ADVOCATES AND ATTORNEYS TO BE HEARD BEFORE JUSTICES OF THE PEACE.

Our readers may remember, that at page 135. of our present volume we reported a case, decided in the King's Bench, in which it was holden that a party, whether accusing or accused, in a proceeding before justices of the peace at a petty session, has no right to have an advocate present, even though their decision might be final. We cannot avoid thinking, that the Court of King's Bench, in that decision, has taken a very narrow view of the subject. Lord *Tenterden* founds his opinion on this reasoning: "All Courts of justice have immemorially regulated the proceedings of their own Courts. A Doctor of Civil Law asks leave before he can plead in this Court; and I believe that barristers at law ask leave

before they speak in the Ecclesiastical Courts. In the Court of Common Pleas no persons except serjeants at law are permitted to address the Judges. In some courts of quarter sessions it is still the practice for attorneys to conduct the case of their clients, and speak to the Court. I do not give any opinion as to the right of a person so far to assist as to take notes of the proceedings. Whenever justices of the peace are performing a judicial act, the place becomes an open court, and every body has a right to be present, but not to interfere. On the argument respecting the inconvenience of not allowing advocates to conduct cases before magistrates, I think that it would be most inconvenient if such a right did exist." His Lordship, in the instances he quotes, which we are to conceive he supposed would support his opinion, is rather unfortunate; for they only show the different modes in which advocates are allowed to exercise their profession on behalf of their clients, but by no means show that a client has no right to the assistance of an advocate: on the contrary, they tend to support the right. If his Lordship had been able to find a precedent for the dispensing with advocates in any Court, he would no doubt have adduced it. And if a Judge of his learning could find none, it is fair to presume none existed.

But losing sight for a moment of the instances, let us look to the principle. "All Courts of justice," says his Lordship, "have immemorially regulated the proceedings of their own Courts." Now, we admit that Courts may regulate their practice according to their own discretion, so long as that practice is not inconsistent with the rights of suitors. But, if their practice is inconsistent with the rights of suitors, the practice is a bad one, and ought to be abolished. Now, we conceive that no right of the suitor can be more firmly established, than that of being heard by an advocate. This right depends, not upon any practice of Courts, or legislative enactments, but upon the progress of society. When population increased, the division of labour was established, and it was found most convenient that one set of men should devote themselves to the business of an advocate. For, as laws multiplied, and the relations of society extended, it was found impossible for each man to be able to conduct his own cause. The almost universal practice of Courts to admit the employment of advocates is a direct recognition of that right. It surely cannot be in the power, or at least ought not to be, of justices of the peace to deny a right recognised by the highest Courts in the empire.

His Lordship also says, "On the argument respecting the inconvenience of not allowing advocates to conduct cases before magistrates, I think that it would be most inconvenient if such a right did exist." Here, again, we beg leave to disagree with his Lordship. Why would it be most inconvenient "that such a right should exist?" Is it found inconvenient in the higher Courts, where we may presume there is less necessity for the information which advocates can afford? If not inconvenient there, why should they be inconvenient before magistrates? For ourselves, from what we have seen of magisterial tribunals, we are fully convinced that the employment of advocates is preventive of frequent injustice. When the law is clearly pointed out, the magistrate will hardly venture to infringe it, however his disposition may prompt him so to do. But, supposing that in former times, when the trial by jury always stood between the Judge and the accused, when the Judge was not to decide both on law and fact, the necessity for the interference of advocates might not have been so great: now, that the abolition of trial by jury, and of appeals to superior Courts, seem to be prevailing objects of the legislature, it is exceedingly important that the right of suitors to be heard by advocates should be enforced to the utmost. By the 7 & 8 Geo. 4. c. 29., and the 7 & 8 Geo. 4. c. 30., and the 9 Geo. 4. c. 31., the power of justices to inflict punishment for crime without the intervention of a jury is quite enormous. Surely, in such cases, it must be most important that the parties' right to have an advocate present should be recognised. It will, perhaps, be said, that this power is not abused by the justices; and therefore there is no necessity for advocates to be present. Now, let us see whether this new power has not been abused by the magistrates intrusted to exercise it. By the 27th section of the 9 Geo. 4. c. 31. it is provided, "That where any person shall unlawfully assault or beat any other person, it shall be lawful for two justices of the peace, upon the complaint of the party aggrieved, to hear and determine such offence; and the offender, upon conviction thereof before them, shall forfeit and pay such fine as shall appear to be meet, not exceeding together with costs (if ordered) the sum of *5l.*:" and in case of non-payment, the offender to be liable to imprisonment for two months. Now, the object of the legislature in making this enactment was, no doubt, merely to allow the justices

to interfere in cases of common assaults among the lower orders, where it could not be necessary or beneficial to send the parties to the more expensive and dilatory tribunal of the quarter sessions. But it is a known fact, which has been brought before the Court of King's Bench *, that the magistrates have proceeded so far in the exercise of their discretion, as to fine persons under this clause for acts amounting to attempts to commit unnatural offences. The magistrates have thus usurped a power to decide both on law and fact, on a charge, a conviction of which must consign the party to infamy and ruin. The party has no remedy. No appeal is given by the statute, and the *certiorari* is taken away (§ 36.). In one instance, which has come to our own knowledge, a man of high respectability was charged, by a person of infamous character, with practices of an unnatural description. The justices thought proper to treat the case as one of a common assault, and fined the party 5*l*. The consequence was, that his creditors heard of it; every person with a claim upon him instantly demanded its liquidation, and in a few days he became a bankrupt. There is no doubt, that if a party were to be deprived of the benefit of an advocate's assistance in such a case as that, he might be subjected to still greater injustice. The trial by jury being removed, the only check on magistrates is the presence of an advocate.

However, as the Court of King's Bench has solemnly determined that two justices at petty sessions have a power, not possessed by the fifteen Judges of England, nothing but a legislative enactment can alter the law. But it is to be hoped, that on this most important subject something will be done by parliament, that we may not be delivered over gagged and bound into the hands of the magistracy.

SUPERIOR COURTS.

LORD CHANCELLOR'S COURT.

INJUNCTION. — PRACTICE.

Where notice has been given of a motion on the part of the plaintiff, and affidavits have been made to support it, the defendant is entitled to two clear days after the filing of the affidavits to answer them.

Sir *Edward Sugden* moved to discharge an order of the Vice-Chancellor pronounced yesterday, whereby the defendant, Earl Ferrers, was restrained generally from cutting any timber upon an estate of which he was tenant for life. The order now appealed against was made under the following circumstances: — A bill was filed by the plaintiffs, who were infants, and entitled in remainder to the estates in question, subject to Lord Ferrers's life estate therein. One of its objects was to prevent the cutting of ornamental and other timber; and on the bill being filed, an injunction was applied for, and granted *ex parte*. It was alleged that the injunction had since been broken; and in consequence notice was given of a motion against the defendant for such breach. When that motion was about to be made the day before, Mr. *Wakefield*, as counsel for the defendant, applied that it might stand over, to enable his client to see the affidavits on the part of the plaintiffs, for the purpose of answering them; and those affidavits having only been filed one clear day before, he insisted that he was entitled to the delay. His Honour the *Vice-Chancellor* said, he would permit the delay, if the defendant would undertake, in the mean time, to cut no timber. This undertaking Mr. *Wakefield* refused to give, whereupon the order now appealed against was made. Sir *Edward Sugden* now, therefore, insisted that the order should be discharged, the defendant being entitled, as a matter of right, to claim such delay as he asked for, and that it was not to be regarded as an indulgence.

Messrs. *Knight* and *Kindersley*, on the other side, contended, that the defendant had had time since March last, when the injunction was issued, to dissolve it, if he had grounds to do so; and that, although he might require time to answer the affidavits on the motion for a sequestration, he could only have it upon such terms as the Court chose to impose; and that not having agreed to those terms, the Court could in no way assert its own authority, or protect the property of the infants, so properly and so effectually as by making the order now appealed from.

The *Lord Chancellor*, without calling upon the appellant's counsel to reply, gave judgment. He said the case was one of importance, but, in the light in which he viewed it, it admitted of no doubt whatever. The extraordinary power which this Court possessed of interfering with the rights of property by means of injunction, was one which must from its nature be regarded with jealousy, and not resorted to but when it was recommended by almost unavoidable necessity. All the Judges who had sat in this Court had recognised the principle he now laid down, though some of them had occasionally deviated from it in their practice; and all had admitted the expediency of not extending it to cases in which it would be needlessly burdensome — it might be oppressive. If in this case the defendant had asked for time to answer the affidavits, to which he was not entitled, the Court might, no doubt, impose terms. Here it was denied, on the part of the defendant, that the delay he claimed was a matter of indulgence, but he stood upon it as a right. Upon referring to the Register, his Lordship understood, that, under the old practice, when one clear day's notice of a motion was enough, it was also sufficient to file the affidavit one clear day

* 1 L. O. 44.

before the motion was made. Here there was one clear day; but now the practice was altered as to the notice, which must be two clear days. Could the defendant then answer the affidavit? It was said he was living in London, but that did not enable him to answer it in sufficient time; and if he had been living in Leicestershire at his estate, or elsewhere in the country, it would have been still less possible for him to do so. He could not, therefore, doubt that his Lordship was entitled to have time allowed him to answer such affidavits. The order, then, was to be dealt with as a simple order restraining the defendant from cutting timber generally upon the estate of which he was tenant for life. He was sorry to differ from the learned Judge by whom that order had been made; but he could not help thinking that it was wrong, and it must therefore be discharged. He must however observe, that it behoved every defendant in this Court, and the agents and persons employed by every defendant, to weigh maturely, when they were cutting any timber after an injunction had issued, that none of the timber so cut was comprised in the injunction.

It would be no creditable thing to a nobleman to have a sequestration issued against him, nor an agreeable thing for any man to be a prisoner in the Fleet; and if after this intimation any party was found so offending, they would discover that they had committed a contempt not easily to be purged. He said this, not because he thought there was any necessity for it in this case, but to quiet the alarms which the plaintiffs appeared to entertain of the consequences of the order being discharged.—*Shirley* v. *Lord Ferrers*. L. C. June 3. 1831.

On June 29. 1831. another application was made to the Vice Chancellor by Mr. *Knight* (and Mr. *Kindersley* with him), the time having expired for filing the plaintiff's affidavits, that a sequestration should issue against Earl Ferrers; and also that his steward, Mr. Davey, should be committed for contempt. Affidavits were read to show that the trees cut down by the defendants in opposition to the injunction were ornamental trees, and immature oak and other trees.

Mr. *Wakefield* was heard for the defendants.

The *Vice Chancellor* said, that the question was one of fact, viz. whether there had been a breach of the order of the Court restraining the defendants from cutting down the timber. There was abundant proof that timber which came within the order had been cut down; and the Court, therefore, had no other alternative but to grant the order as prayed.—*Shirley* v. *Earl Ferrers and another*. V. C. June 29. 1831.

RESERVED BIDDINGS.

When a reserved bidding will be allowed.

Mr. *Solicitor-General*, Mr. *Sidebottom*, and Mr. *Tinney*, moved for an order, directing the Master to fix a reserved bidding on sale of certain estates directed to be disposed of by the Court. By the will of the Hon. Basil Cochrane, late a Judge in India, he directed his estates to be sold, and certain legacies to be paid out of the produce. One of the estates was valued at 52,000*l*., and another at 125,000*l*. In 1829 the estates were put up to sale, and the bidding reserved in accordance with the valuation. Only 49,000*l*. was bid for the larger estate, and the bidding for the other being below the reserved price, neither of them were sold. The estates were now again to be put up for sale; and it was wished to have a reserved price fixed by the Master, which price was not to be disclosed.

Sir *Edward Sugden* and Mr. *Wakefield* opposed the motion, on behalf of certain legatees, who were the natural children of the testator. The testator had expressly directed his estates to be sold as soon as was possible after his decease. In giving this direction he by no means adopted words of course in a will; but because he knew that the persons whom he intended to take the benefit of the bequests had no other means of subsistence than that which would proceed from the sale of his estates, he desired expressly that the produce of such sale should be realised as soon as was practicable. The legatees on whose behalf he opposed this motion were wholly dependent upon the means which the sale was to afford to them, and they had already not only suffered great inconvenience, but had been reduced to painful and deep distress by the delay which had intervened. Some of them had been compelled to anticipate the benefit they were to derive from the will of the testator, and in order to support themselves had been compelled to borrow money upon their reversionary interests, on such exorbitant terms as loans of that nature could alone be obtained. The interest on the legacies had not been regularly paid; and one of them, a young lady, died in great want, in 1830, having at that time a year's interest upon her legacy due, which her executor had subsequently received. The delay had been injurious even to the very parties for whose advantage it had been permitted; and as the biddings might be opened if a higher offer were made than was bid at the sale, there was no reason why the biddings should be reserved. The Court had, in many instances, discountenanced the practice of reserved biddings, which could scarcely ever be necessary, and which nothing but very particular circumstances could at all justify. There were no such circumstances in this case. The form of the order in this case was highly objectionable, and was in strong confirmation of that which his clients alleged,—that there was collusion on the part of those whose interests were opposed to their's. The order did not compel a sale, but left the parties at liberty to sell.

Mr. *Tinney* denied that the interest had not been regularly paid, or that there was any collusion; and contended, that it was the intention of the Master of the Rolls, who had heard the cause, that there should be a fixed price below which the estates should not be sold.

The *Lord Chancellor* complained of the conduct of some of the parties in this suit, who had addressed some communications to him. Nothing could be more improper than such a practice; nothing more likely than this to bias (if any thing could bias the mind of a Judge) the person to whom such communications were addressed, against the case of a party who thought it was necessary to help it by means so blameable.

It could only tend to disquiet the Judge's mind. He was of opinion, although he disapproved of reserved biddings in general, that it would be best here to follow the direction of the Master of the Rolls. He would, however, write down the terms of the order himself, and he should not fail to call the attention of the Master to the delay which had taken place, and to what has occurred with respect to the former reserved biddings; and these circumstances would, as they ought, influence the price which was to be fixed. — *Cochrane* v. *Cochrane*. June 3. 1831.

KING'S BENCH.

(*Practice Court.*)

AFFIDAVIT. — JURAT. — ERASURE.

An affidavit of debt, in the jurat of which the date is stated to be "one thousand eight hundred and thirty," instead of "one thousand eight hundred and thirty-one," is insufficient.

Kelly showed cause against a rule calling on the plaintiff to show cause, why the bail-bond should not be delivered up to be cancelled on the ground of an erasure in the *jurat* of the affidavit to hold to bail. In the *jurat* the words were "sworn at the *Common Bail Office, London*, King's Bench Office in the Inner Temple, the twelfth day of April, one thousand eight hundred and thirty." The words "Common Bail Office, London," were erased, or rather struck through, with a pen. This was one objection. There was another, namely, that the date of the affidavit was "one thousand eight hundred and thirty," instead of "one thousand eight hundred and thirty-*one*." With respect to the former objection, it was a rule of the King's Bench, "that no affidavit be read or made use of in any matter depending in the Court in the *jurat* of which there shall be any interlineation or erasure." * Now the word "erasure," which this was contended to be, he submitted, meant "the removal by scraping of a word from the paper." Here that had not been done. The pen had only been struck through certain words. It therefore did not come within the rule. What was the foundation of that rule? What was the evil it sought to prevent? It was the removal of certain words, and the substitution of others in their stead, so that it would be impossible to discover what the removed words were. Here nothing of the kind had been done. The pen, it was true, had been struck through certain words in the *jurat;* but it was perfectly easy to perceive what those words were. As to the second point, he conceived the Court would not make this rule absolute, merely on the ground of the word "one" being omitted. The test in all such cases as to whether the affidavit was sufficient, was the possibility of indicting the party making it for perjury. Now, notwithstanding both these alleged defects, he conceived it would be perfectly possible to assign perjury on this affidavit if it were false.

Taunton J. Not with the second defect; because it might be perfectly true, that the defendant owed the plaintiff money in the year 1830, though he owed him none in 1831. I therefore think the latter point is a fatal objection, without saying any thing of the former. The rule must be made absolute.

Rule absolute. — *Dicas* v. *Proctor*. E. T. April 28. 1831.

DISCONTINUANCE.

Where a Defendant has absconded in debt, and cannot be found, the Court will grant a rule to show cause why the Plaintiff should not be at liberty to discontinue without payment of costs.

Langelow moved for a rule to show cause why a *stet processus* should not be entered, on the ground that the defendant had gone out of the way in debt, and that although many efforts had been made to discover him, he could not be found.

Taunton J. I don't think you can have a rule to show cause why a *stet processus* should not be entered. The court has no power so to do. It may enforce a *stet processus* when the matter comes before the court. You may take a rule to show cause why the plaintiff should not be at liberty to discontinue without payment of costs; and let the rule be served on the defendant's attorney.

Rule *nisi* granted.

Anonymous. E. T. April 28. 1831.

DEFENDANT'S COSTS, 43 Geo. 3. c. 46. § 3.

Where a Plaintiff has arrested a Defendant for more money than appears on the trial to be due, but there is no ground for imputing to the Plaintiff any mala fides, *he is not liable to pay the Defendant's costs, under the 43 Geo. 3. c. 46. § 3.*

Platt showed cause why the defendant should not be allowed his costs under the 43 Geo. 3. c. 46. s. 3., on the ground that the arrest had been made for a greater sum than was probably due, and the plaintiff pay the costs of the application. The male defendant was arrested for the sum of 61*l.* 16*s.* 4*d.* The action was brought against husband and wife. The female defendant had been the widow of a person named Slater, who had been employed by the plaintiff to collect the rents of the latter. After the death of Slater, his widow continued the collection of rents for the plaintiff. In September, 1829, an account was furnished by her in the name of Collins (that being the name of her second husband) of the rents received, and she admitted a balance of 40*l.* 2*s.* 4*d.* to be in her hands. The remainder of the debt consisted of 5*l.* money lent, as to which there was no dispute; 8*l.* 14*s.* 0*d.* for hops supplied by the plaintiff, while in partnership with a person named Watson; and 10*l.* for money due on striking a balance of accounts since the partnership. As to the two first *items* there was no dispute. The sole question, then, remaining was with respect to the 8*l.* 14*s.* 0*d.* and the 10*l.* As to the 8*l.* 14*s.* 0*d.* alleged to be due on the partnership account, when the plaintiff

* R. M. 57 Geo. 3. K. B. 7 T. R. 82. R. T. 1 Geo. 4. Exchequ. 8 Price; and see 11 Price, 309. But an erasure *over* the *jurat* does not vitiate it. 2 Chit. R. 19. 1 Tid. Prac. 495., ed. 9.

and Watson dissolved partnership, it was agreed that the credits were to be carried to their single and separate accounts. The plaintiff might not be aware that he must bring his action in the name of his partner and himself, and that unless he did so, he would not be entitled to recover the debt. With regard to the 10*l.*, he was informed by his agent, King, that it was due from the female defendant. It appeared, on the trial, however, that it was not due. This was surely not sufficient to entitle the defendant to his costs. The plaintiff had proceeded on what he believed to be correct information.

Taunton J. I am of opinion this case is not within the 43 Geo. 3. c. 46. § 3. With respect to the 8*l.* 14*s.*, he has reasonably accounted for having included that in his own demand as part of the subject-matter in the suit, which was due to himself and another person. It appears there had been a partnership between the plaintiff and Watson. On the dissolution of it, it was agreed that the credits of the firm should be carried to the single and separate accounts of the two parties. Now, it is very common for people to suppose, that *choses* in action are transferred by mere agreement between parties. I think that is a matter not of itself sufficient to bring this case within the statute. Then, with respect to the 10*l.*. The circumstances attending the inclusion of that sum in his demand are not, in my opinion, sufficient to entitle the defendant to his costs. It appears that he was misled by the incorrect information of his agent. I am afraid we should hold much too strong a hand over the proceedings of creditors, if we, in such circumstances, where a creditor is misinformed by his agent to the extent of 10*l.*, should say he ought to be subjected to the payment of the defendant's costs. It appears that he applied to his agent, King, and that he was not sufficiently informed by him as to the state of the accounts. Although there was some carelessness in not making a more strict enquiry, it would be much too hard to make him pay the defendant's costs, where it does not appear he has acted with any *mala fides*. The rule must, therefore, be discharged, but without costs.

Rule discharged without costs.

Wigan v. *Collins and Wife*. E. T. April 28. 1831.

ERRATA.

P. 187. *antè*, "Poor Law," *for* "holden that under the 59 G. 3. c. 30." *read* "prior to the 59 G. 3. c. 30."

MINOR CORRESPONDENCE.

PRACTICE.

To the Editor of the Legal Observer.

SIR,

In the intercourse with my professional brethren, I have occasionally seen questions and differences arise as to who should prepare and who pay for certain instruments. For instance:—on the winding up of an executorship, and the executor requiring a release of claims from the legatees; who ought to prepare this release? The solicitor of the executor, or of the legatees? Likewise in cases of mortgages, leases, covenants, &c.

Probably some of your more experienced correspondents will take the trouble to explain the practice usual with the profession in preparing documents, generally, where each party employs his own solicitor.

I am, Sir,

Your obliged servant,

——C.

INSOLVENT DEBTORS.

A prisoner, who has petitioned the Court for relief of Insolvent Debtors, is ordered to be imprisoned for the period of six months at the suit of *A. B.*, a detaining creditor: is he discharged from the debts of the other creditors in his schedule in the event of *A. B.* discharging him out of custody before the expiration of such imprisonment? If *A. B.* were the only creditor, he, of course, would be discharged altogether from *A. B.*'s debt; but where there are other creditors, and when, as is frequently the case, many circumstances are taken into the consideration of the Court in awarding the quantum of punishment, beyond that of his conduct towards the creditor at whose suit he is ordered to be detained, such as general misconduct, or dishonesty to others, though not opposing creditors; and which, in the course of examination of a prisoner, is frequently elicited by the Court, the object of the legislature and of the Court must often be defeated, if the law, under such circumstances, discharges the man from all his other debts; for, in the event of an adverse judgment on a prisoner, he would find it generally his interest immediately to make terms with his detaining creditor, and thereby defraud with impunity his other creditors, and make a tool of the Court.

I have presumed, in the above question and remarks, that the sentence of the Court does not operate of itself as a detainer, although I do not see why the insolvent should not become, by such a sentence, a prisoner of the Court, and not of any particular creditor.

A CONSTANT READER.

ANSWERS TO QUERIES.

TRANSFER OF MORTGAGE—AD VALOREM. P. 224.

The 55 Geo. 3. c. 184. has provided, that on any transfer or assignment of any mortgage, in all cases where the person entitled to the right of redemption or reversion shall not be made a party to such transfer, and also where the person who *originally* made the mortgage shall continue entitled to the right of redemption or reversion, and shall be made a party to such transfer, the common deed stamp only shall be payable: *provided no further sum of money or stock be added to the principal money or stock already secured.* The act then provides, that *in all other cases such transfer shall be charged with the same duty or duties as an original mortgage.*

If these united clauses be taken literally, in every case where a further sum is advanced on an assignment of mortgage, the full duty on the whole is payable; but Mr. Coote, in his valuable work on mortgages, is of opinion that such was not the *intention* of the legislature, because

the provision would be frustrated by the simple operation of an assignment of the original mortgage, and an indorsement subsequently executed by way of further charge for the additional sum; and it cannot be presumed the legislature could mean to affix the heavy duty merely on *the form* of the additional security.

Mr. Coote further observes, that counsel on behalf of an assignee of a mortgage do not feel themselves justified in admitting that he will be safe in advancing a further sum, unless the full duty be paid on the total amount of the mortgage money, although the mortgage be burdened with the payment of the full mortgage duty a second time. F.T.S.

MISCELLANEA.

ANCIENT SALARIES OF THE JUDGES.

Fees and salaries are now undergoing a general revision: it may, therefore, not be inappropriate to notice the stipends of the dignitaries of the law in by-gone days.

It appears, according to Dugdale, that there is no authentic account of the salaries of the Justices at Westminster before the eleventh year of Henry 3., the Liberatæ Rolls before that time being all perished: but then Will. de Insula and R. Duket had each of them 10 marks per annum out of the Exchequer.

In 23 Hen. 3. the fees were increased; Will. de Culeworth, one of the Justices of the Common Pleas had, per annum, a fee of 20*l.*

In 27 Hen. 3., Alexander de Swereford, a Baron of the Exchequer (and Chief as it should seem), had, per annum, 40 marks.

In 38 Hen. 3., John de Wyville, one of the Barons of that Court, 20 marks.

In 43 Hen. 3., Gilbert de Preston, then one of the Justices of the King's Bench, had, per annum, 40*l.*

In 44 Hen. 3., Roger de Thurkilby, one of the Justices of the Court of Common Pleas, per annum, 100 marks. But Dugdale supposes that he was then Chief Justice in that Court, though there was a Justiciarius Angliæ at the same time; for Robert de Briwes, then also a Justice in the said Court of Common Pleas, had no more than, per annum, 40*l.*

The fee of Will. de Wilton, the next Chief Justice of the Court of Common Pleas, was advanced to 100*l.* per annum.

The fee of the other Judges in that Court being but 40*l.* a piece.

So also the salaries were enlarged in the *Exchequer*.

In 49 Hen. 3., Roger de la Laye, one of the Barons there, had 40*l.* per annum; but this was not held long, for Gilbert de Preston, Chief Justice of the King's Bench in 35 Hen. 3., received but 100 marks per annum. Nor had he more in the beginning of King Edward I.'s time, when he was Chief Justice of the Court of Common Pleas.

After this they sunk more: for Thomas de Weyland, Chief Justice of the Common Pleas in 7 Ed. 1., had but 40*l.* per annum; and Walter de Wymburne, another Justice of the same Court, 40 marks; which proportion, viz. 40*l.* per annum to the Chief Justices of both benches, and 40 marks a piece to the Justices and Barons of the Exchequer, continued till 25 Ed. 3., as may appear by the Liberatæ Rolls of those times.

Then the salary of the Chief Justice of the King's Bench shrunk more, viz. to 50 marks per annum (which is no more than 33*l.* 6*s.* 8*d.*); the yearly fee of the Chief Justice of the Common Pleas being augmented to 100 marks per annum; the Chief Baron of the Exchequer having no more than 40*l.* per annum, and the other Justices of both benches and Barons of the Exchequer being reduced to 20*l.* per annum.

In 28 Ed. 3., it appears that Thomas de Setone, then one of the Justices of the King's Bench, had 80 marks per annum.

In 36 Ed. 3., the Chief Baron and other Barons of the Exchequer had all alike, viz. 40*l.* per annum.

In 39 Ed. 3., the Justices of the Common Pleas 40*l.* per annum. The Chief Justice of the King's Bench 100 marks. The other Justices of that Court 40*l.* per annum.

In 5 Rich. 2., the Justices of the Common Pleas no more than 40 marks per annum; so also in 8 and 14 Rich. 2.

In 1 Hen. 4., the Chief Baron, and other the Barons of the Exchequer, but 40 marks per annum. The Chief Justice of the Common Pleas 40*l.*; the other Justices of that Court, 40 marks.

In 3 Hen. 4., the Chief Justice of the King's Bench, 40*l.* per annum. And in 9 Hen. 4., John Colepeper, one of the Justices of the Common Pleas, 55 marks per annum.

In 18 Hen. 6., the Judges of the Courts at Westminster, the King's Attorney and King's Serjeants, exhibited a petition in parliament; whereupon, it seems, the King issued writs to the treasurer and chamberlain of his Exchequer requiring to be certified what salaries had been paid to the Justices of the King's Bench and Common Pleas, Justices of Assize, and also the Serjeants at Law and Attorney in the Common Pleas: and likewise what moneys had been paid unto them for their winter and summer robes for the greater part of ten years preceding.

After days, says Dugdale, they had (as it seemeth,) an increase in their salaries, and likewise an allowance in money for their robes.

In 1 Ed. 4., John Markham, then Chief Justice of the King's Bench, had a yearly pension of 170 marks, as also 106*s.* 11*d.* and a sixth part of a halfpenny for his Christmas robe, and 66*s.* 6*d.* for his robe at Whitsuntide.

In 1 Hen. 7., Sir William Huse, Knt., constituted Chief Justice of the same Court, had 140 marks for his better support, and 106*s.* 11*d.* and a sixth of a halfpenny for his winter robe, as also 66*s.* 6*d.* for his robe at Whitsuntide.

In 37 Hen. 8., there was a further increase of fees, viz. to the Chief Justice of the King's Bench, and his successors for the time being, 30*l.* per annum; to every Justice of that Court and their successors, 20*l.* per annum; and to every Justice of the Common Pleas 20*l.* per annum. *Dugdale's Origines Juridiciales*, cap. 40.

The Legal Observer.

VOL. II. SATURDAY, AUGUST 27. 1831. No. XLIV.

——— "Quod magis ad nos
Pertinet, et nescire malum est, agitamus."
HORAT.

THE COURT OF COMMON PLEAS AND ITS JUDGES.

LETTERS OF A HEIDELBERG STUDENT ON THE JURIDICAL INSTITUTIONS OF GREAT BRITAIN.

LETTER IV.

THE next Court of which I purpose to give you an account is the Court of Common Pleas, which ranks among the Common Law Courts next after the King's Bench. It has always been conspicuous for the character of its Judges, and their decisions. Its jurisdiction has even been more extensive than any other Court, although at the present time, by a series of innocent fictions, the Courts of King's Bench and Exchequer have nearly the same powers. It is still, however, the proper Court for trying what are called *real actions*, or actions strictly relating to lands; although here, also, the necessity for throwing open all exclusive jurisdictions has introduced a form of action called an action of ejectment, which, by a somewhat clumsy machinery, enables the other Courts to take cognisance of pleas relating to land; the older forms, called real actions, being now almost entirely out of use.

Having made these few observations, I shall proceed to mention to you the Judges who now preside in this Court.

In this, as in the Court of King's Bench, the Judges are now five in number; namely, a Chief Justice, and four *puisne* Judges, the number of the latter having been recently increased from three to four.

The present Chief Justice is Sir N. C. Tindal. He was remarkable, when at the bar, both before and after he attained the rank of Solicitor-General, for a deep and intimate acquaintance with law. His talents were, however, never very brilliant or striking; and his political career, as the official adviser of the Crown, was not in any way distinguished. He practised for a considerable time under the bar as a special pleader; and soon after he came to the bar he obtained very considerable practice, and was in great repute as a black-letter lawyer. His judicial talent was quickly recognised, although he owes his present situation chiefly to political influence. He has hardly answered expectation. His mode of viewing a case is by no means vigorous; and his decisions are deficient in that perspicuity and freedom from doubt which might have been anticipated. He has hardly sufficient energy to restrain the turbulent dispositions of some of the advocates who practise in his Court. He is, however, correct, mild, and patient in his demeanour. His judgments frequently display great learning and good sense; and though he does not display the searching penetration of a Mansfield or an Ellenborough, he is universally esteemed a very considerable authority.

Mr. Justice Park is the senior *puisne* Judge. His knowledge of mercantile law is good; but I understand he is considered deficient in the other branches of legal knowledge. He is an avowed enemy of special pleading. This, the special pleaders say, arises from his not being overburdened with knowledge of the art. On this merely technical point I, of course, my dear friend, cannot pretend to give an opinion. In his mode of trying causes it seemed to me that he evinced considerable talent, in confining the attention of the counsel and of the jury, as well as the evidence, to the real issue to be tried. I, however, observed that he seemed to pay too much attention to matters of no importance * which occurred in court; such as the particular dresses of witnesses and prisoners, their mode of cutting their whiskers, and similar trifles. Indeed, there is an abundance of amusing stories related concerning this peculiarity of the learned Judge.

The next *puisne* Judge is Mr. Justice

* *Kleinigkeiten* in original.— *Trans.*

Gaselee. He is considered a good lawyer, and well acquainted with pleading and practice. Though somewhat slow, I am informed that his decisions at *nisi prius* have generally been supported by the other Judges, when applications to reverse them have been made.

Mr. Justice Bosanquet is a Judge of moderate talents for his situation. He is slow in his apprehension of a point; and his determination on it is not unfrequently over-ruled. He has not, however, been two years on the bench; and therefore it would, perhaps, be unfair to give a decided opinion on his capabilities.

Mr. Justice Alderson is the youngest of the Judges in this Court. He is one of those exalted to the bench under the authority of a recent act of parliament for increasing the number of the Judges. He was much distinguished at Cambridge, where he was educated; and acted as reporter of the Court of King's Bench for several years. He was also a commissioner for the improvement of the law. Great anticipations were therefore formed of his judicial capacity. At present, however, he is considered as a decided failure. He is remarkable for his hasty mode of viewing any matter which is brought before him, and his obstinacy in retaining his opinion when formed. His mode of expressing himself is indistinct, both in language and utterance. Still, as a year has not yet passed since he was appointed, it may be hoped that he will correct these unfortunate peculiarities. His knowledge of law is undoubtedly very great.

The advocates practising in this Court during term-time are known by the title of Serjeants. During term they are the sole persons possessing a right to address the Bench. After term, however, during the sittings at *nisi prius*, any barrister has a right to practise there. The title of "Serjeant" designates a degree in the law. Through it all must pass previous to their elevation to the bench.

There is no fixed qualification necessary in order to enable a barrister to become a serjeant. He may be in large business, or in small business; he may have been one year at the bar, or twenty: his attaining that rank depends on the pleasure of the Lord Chancellor. Still, as by becoming a serjeant a man deprives himself of all minor business — for etiquette will not permit him to act under a barrister of a degree below the coif — a man's interest generally prevents him from applying for the honour, unless the state of his business, or the estimation in which he is holden, appears to warrant such a step. There is an exception in the case of a Judge; for, as it frequently happens that a barrister not of the degree of the coif is appointed a Judge, and as a Judge must be of that degree, such a barrister takes the degree, as a mere preparation for his office, immediately previous to his becoming a Judge, and after his appointment. All the serjeants are, consequently, in their character of serjeants, of equal degree with the Judges; and therefore all the Judges, both in this Court and the others, address them as "Brother." The mode of becoming a serjeant is this: — An application, stating his pretensions, is made by the barrister desirous of that honour, to the Lord Chancellor. The latter generally writes to the Chief Justice of the Common Pleas; and if the recommendation sent by the Chief Justice be satisfactory, a writ, under the Great Seal, issues to the Chief Justice of the Common Pleas, commanding him to call the barrister to that degree. The future serjeant then takes the usual oaths in the Lord Chancellor's private room. He is afterwards introduced to the Judges of the Common Pleas in their private room. He there kneels, and the Chief Justice pins the coif on his wig. The coif is a round piece of black silk. He then reads a count or declaration on a real action, and retires from the room. Afterwards he is introduced from the back of the Court, through a passage formed by raising the seats of the serjeants, to the front of the bar. There he again reads a count. He is then called upon to make a motion, and retires through the same passage. One curious ceremony connected with becoming a serjeant, is the presentation of rings by the new serjeant to the Lord Chancellor, Judges, serjeants, and others. These rings vary in size and appearance, according to the rank of the party to whom they are presented; but they all bear one and the same motto. The selection of that motto depends on the taste of the serjeant.

I have now mentioned to you the mode of becoming a serjeant, and the forms attendant thereupon. I have not, however, given any opinion on the propriety of this institution. You will ask, why the Court of Common Pleas should differ in this respect from the other great Courts of the country? why should it have a peculiar bar? and why should it not be open to the whole body of the profession? These questions suggest themselves to every stranger who enquires into the subject. I have heard no satisfactory reply to them. The only answer that is given, is the old one given to

all such questions.—The system exists; it has been originally instituted for good reasons; and although those reasons may not now exist, yet, as its continuance is not attended with any great evils, it should not be abolished. It is not, however, attempted to be said that it would not be for the benefit of the whole Bar, and of the public, that this useless monopoly should no longer exist. I am assured that it is frequently inconvenient in practice to a great degree. Particular subjects are best treated by particular advocates, and on these subjects it is most important to obtain their services. Unless, however, they are serjeants, this benefit cannot be obtained in this Court. It frequently happens, also, that on circuit, or in other Courts, particular barristers are engaged in a cause, and are therefore most familiar with its details and secrets. If, however, it get within this exclusive jurisdiction, unless they have obtained this fictitious rank their clients can no longer obtain their services, and much hardship is inflicted on the public by this useless monopoly. It is rather surprising, as the Common Law Commissioners have recently thrown open the Court of Exchequer, that they should have thought proper to support the cause of exclusion in this Court. It has, indeed, been accounted for by the ill-natured, who choose to remind us that two of the learned commissioners were themselves serjeants. I cannot, however, think that this circumstance could have influenced their determination to keep up a system that has been so long the subject of complaint. The character of the commissioners is far above a suspicion such as this. I am now hurried to the House of Lords to a great legal debate.

Ever yours affectionately,

* * * *

NOTES ON THE EARLIER CONSTITUTIONAL HISTORY OF ENGLAND.

[The knowledge of the constitutional history of this country is so important to the English lawyer, and is nevertheless so often neglected, that we have had great pleasure in being able to procure these notes, which are written by a barrister whose opinions on the subject are well entitled to attention, and may be useful to the student as to the course which he should take.]

STATE OF BRITAIN UNDER THE ROMANS.

The chief power of the kings seems to have consisted in leading the armies of the several nations; when peace was made, they again became almost individuals.* The whole civil power was trusted to the Druids, whose power seems to have been unlimited. Military government was of course brought in with the Romans. Lands, cattle, and men, and many other things, were taxed. Britain was divided into five provinces, viz. Flavia Cæsariensis, Britannia Prima, Britannia Secunda, Maxima Cæsariensis, and Valentia, each of which was composed of many smaller states.

We are accustomed to think and speak of our ancient British ancestors as completely sunk in the grossest barbarism before the first invasion of Cæsar; but this seems erroneous. The Druids were certainly the only *learned* men, but learning was confined to the priests of the several nations many ages afterwards; and this learning was respectable. Pythagoras is said to have visited every sect of philosophers, and amongst them the Druids, and to have even borrowed from these latter. They were skilful physicians and astronomers, and seem not to have been altogether deficient in the various branches of the learning of the time. The noble youth were educated by them, and most of the leading men were of their order. On the whole, there seems to have been little difference between the situation the Druidical order occupied in the first century, and that which was filled by the monkish in the fifth, making allowances for the growth of knowledge and civilisation which the whole world had made during the interval. The Phœnicians, the most civilised nation of their age, traded with Britain probably 600 years A. C. British tin, lead, iron, pearls, baskets, gold and silver, were every where known, and the fleet was very large. Money was coined as early as King Cunobeline, who lived between the two invasions of Julius Cæsar. The art of war was carried to very high perfection, and the chariots even amazed Cæsar. Another distinguishing mark of civilisation was the attention that was paid to the British females. They were always consulted in matters of importance, and (see Henry, vol. ii. chap. 7.) were treated with wonderful attention. Henry, however, is mistaken in saying that only one wife was allowed, as Cæsar distinctly states that they were even common property.

* Although it appears trifling to go to poetry for an illustration of history, yet I may observe that in the ancient ballads the situation of the kings appears quite private; and King Estmere &c. were drawn at least from traditional British monarchs. See Rel. of Ancient Poetry, vol. i.

The Druids seem to have been distinctly known as a sect of philosophers throughout all the philosophical world; and, though wholly ignorant of *literature*, seem to have had vast learning. I looked over the Introduction to Camden's "Britannia." Henry has gleaned the chief of what he says. I also turned over the pages of Eccles. Hist. Bedæ. It is written in bad Latin, and is full of monkish miracles. I began Carte (fol. edit. 1747). He confirms my opinions as to the learning of the Druids, but represents the other inhabitants as little better than barbarians. I read Holinshed's Chronicles, to the Saxon conquest, but gained little information from these. I also read the Epistle of Gildas, our first historian, written in the times of Hengist and Horsa: it is an inflated philippic against the manners of his countrymen, and gives very little information. According to him, however, the character of the Britons seems to have been very inferior, being known to foreign nations as cowardly in war as unstable in peace. I began Hume and Andrews (an antiquarian work). Hume's account of the ancient Britons appears very unsatisfactory. Began also Rapin's England and Sir Richard Baker's Chronicle.

THE SAXONS. A. D. 449.

The arrival of the Saxons, it appears to me, was a most beneficial thing to Britain. The well known Roman policy (and particularly under the emperors, when the empire tottered under its own weight,) was, after having conquered a nation, to take away the means of all future resistance; and it succeeded completely in Britain. The inhabitants were disarmed and enslaved, their spirits broken and their vigour enervated: whilst the Romans were willing to impart to them all their luxury and refinement, they withheld all instruction in the art of war; so that the Britons were, in the words of Gildas, terrified by the powers of the Romans. Thus it was, that the same people who had vigorously opposed the landing of the first people of the world when at the zenith of power and valour — who had struggled with them for many years, had frequently defeated and always defied these universal conquerors, — had become in a short space of time so enervated and enfeebled, that they were plundered and murdered by a scattered band of raw barbarians, without raising a resisting hand.

Things were in this state when the Saxons, a rude but brave people, were invited. Nothing but such a thorough revolution as this occasioned could have effected the wished-for alteration; but by this it was effected. The British bravery again revived, and although they gradually ceased an unavailing struggle, yet they were soon incorporated with their conquerors, and imbibed their manners. Civilisation and luxury may be soon acquired, a people may get gradually polished; and as this does not come all at once, it is less observed by themselves: but the dispositions of a country can only be altered by some thorough and striking change, which shall bring other interests to predominate and other *stimuli* to work.

There is no period of English history so uninteresting as that of the Heptarchy. We see battles, and usurpations, and murders, take place; but we see them as through a mist. We feel neither hatred for the wicked, nor compassion for the injured. "What instruction or entertainment," says Hume in his notice of the kingdom of East Anglia, "can it give the reader, to hear a long bead-roll of barbarous names — Egni, Annas, Ethelbert, Ethelwald, Aldulf, Elfwold, Beorne Ethelred — who successively murdered, expelled, or inherited from one another, and obscurely filled the throne of that kingdom?" And this, with little variation, is the history of the other six kingdoms. The kings seem to have been merely the captains of bands; and one subject alone distinguished from another by superior riches or superior ferocity. Religion seems to have been a very minor consideration — a thing to be thought of when sick or dying; and we hear less of Saxon priests than of the priests of any other barbarian nation. It is certain that Christianity lessened their ferocity.

When Egbert (A. D. 827.) brought the other kingdoms under subjection, our feelings begin to change: we are interested in the success of his enterprise; and from that time we see more clearly the events that happen. Egbert did little more for England than conquer it. He was an enterprising soldier; and, what with his neighbours, and the Danes, his life was spent in the field. He had, however, received a polish at the court of Charlemagne; and if he had had time, might have communicated it to his own kingdom. As it was, he left it in a very unsettled state to his son Ethelwolf, who had neither the mind nor the valour of his father; and his battles and weakness, and the reigns and battles and weaknesses of Ethelbald and Ethelbert and Ethelred, his sons, would possess as little interest as those of their Heptarchian ancestors, were not this gloom to be suc-

ceeded by a brightness that has never been equalled in splendour and utility in any country at any time. Ethelwolf and Ethelbert, and Ethelbald and Ethelred, can only claim our attention as being the father and brothers of Alfred the Great. This wonderful man, who merits all the eulogiums that have been so abundantly heaped on him, was hailed king in the year A. D. 871; and never can a nation glory more in a king. To whatever part of his character we direct our attention, we shall find our expectations equalled, if not surpassed: he was valiant with the valiant, and wise with the wise; virtuous with the virtuous, and prudent with the prudent. "If we consider his regular exercises of religion, one would think he had never been out of a cloister; if his wars, that he had lived no where but in a camp; if his learning and writings, that he had passed all his time in an university; if his regulations for the good of his people and the security of his kingdom, that he made the laws the study of his life, and that the arts of government had been the only subject of his reflections." — (Carte, Hist. vol. i. p. 317. Testimonia de Alfred. R. ad Fin. Vetæ.) To say he was the best of the Saxon kings would be saying but little; to say that he joined every good quality they possessed would not be saying too much. He had all the enterprise and bravery of Egbert; all the clemency and mildness of Edward the Confessor; all the prudence of Edgar the Peaceable; all the constitutional wisdom of Athelstan. He erected an English fleet out of fishing-boats; he raised huts to palaces; he protected his people alike from foreign invaders and native tyrants: in short, there seems no stain to wipe out; historians of all ages, from Asserius (his contemporary) to Spelman, seem to have only been employed in recording his virtues and great exploits.

The system of police established by Alfred was admirably suited to the kingdom he had to govern; it would now diminish too seriously the liberty of the subject. Nothing could tend to the better regulation of a kingdom, disordered as it was by foreign invasions and civil discord, than the regular scale of dependence in which Alfred placed it. There was always a distinct head of a family: ten of these families made a tithing, ten tithings a hundred: and although this system might have been known long before Alfred (see Carte, vol. i. p. 368.), yet he carried it into full force, and "pervaded and regulated the whole." Every man must have belonged to one of these communities, or be esteemed a vagrant: the Court Baron, the Hundred Court, the Sheriffs' Tourn, &c. were all dependent upon, and regulated by, the King's Courts, which were itinerary: every man knew his exact situation in society; the distinctions were, indeed, very strongly marked, and there was a regular gradation from the villein or slave to the most powerful duke, whose influence often shook, and always checked, that of the king. This system was at its zenith in Alfred's reign; and it had little variation during the reign of Edward the Elder, who equalled his father in military talents, and most other kings in intellectual capacity. But it required an Alfred to watch and guard the English kingdom; the fatal power that the monks attained in this century paralysed the bravest efforts; men gave up their property, and frequently themselves, to monasteries; pilgrimages were thought of instead of marches; fastings were undergone instead of encounters; and the Danes soon renewed their hostilities, and pursued them with the greater success. However, the good order that Alfred had established was not easily overthrown. The Danes gained no considerable advantage during Edward's reign, though their attempts were frequent: and although, from the lustre of Alfred still dazzling us, all minor stars appear mean; yet Edward was a good king in every respect. Athelstan is also worthy our admiration: his encouragement of commerce is the most striking thing in his life, and tells us that he was something better than a mere general. Edmund, Athelstan's brother, displayed many exalted qualities, but he lived too short a time to render them serviceable. So many surprising men had placed the country in comparative safety; and Edred, stained as he was with private crimes, kept it so, although he had little exertion to undergo.

The pitch of power attained by the monks in this reign is wonderful; the most gross deceptions, the most barefaced lies, were readily believed, and highly relished by the English: there never seems to have existed greater sway than Dunstan obtained over every body. The ill effects of this power was experienced in the next reign: the kingdom, the wife, the happiness, and, at last, the life of the unfortunate Edwy, were taken from him by Odo and Dunstan. These prelates, and especially the last, gained rather than lost power in the succeeding reign of Edgar the Peaceable, which was undisturbed by foreign enemies, and only chequered by the persecutions of one order of monks against another. Edgar had powers, but they were

never called into action: history speaks little in his praise, whilst it adds to the blackness of Dunstan, if any thing could be added. Edward the Martyr was the last Saxon king unmolested by the Danes. Scarcely had Ethelred mounted the throne, when (978) his kingdom was invaded by their roving bodies; and soon after (993) a regular descent was made under Sweyn King of Denmark and Olave King of Norway. The disastrous policy of Edward, so justly named the Unready, brought on England that ill fortune from which it did not recover till the Norman conquest. The immense power of the nobles first showed itself in this reign. Alfric, and his son Edric, in the reigns of Ethelred and Edmond Ironside, completely influenced the fate of the country. The scales of the kingdom were so nicely hung, that the slightest preponderance to either side completely overturned the balance. The disastrous battles of the English were succeeded by their subjugation by Sweyn, and afterwards by Canute. This king seems to have governed with moderation and justice: he introduced few Danish customs, and permitted his people to be governed by their ancient laws.

[*To be continued next week.*]

THE PRACTICE OF RETAINERS.

A CURIOUS case on this subject has lately been reported by Mr. Montague, *Ex parte Elsee*, 1 Mont. 69., and the whole law of retainers is discussed in the notes. As this matter has hitherto depended rather on practice than on fixed principles, we are happy to lay before our readers the opinions, in part, of a person so competent to give them as Mr. Montague.

The point arose on a petition being called on, which Mr. Montague was about to open. The Solicitor-General objected to Mr. Montague's being heard, as he was retained by the respondent.

Mr. Montague said he was not retained by the respondent according to the professional rule in the case of retainers; and that even if he had been retained, the Lord Chancellor, sitting in bankruptcy, had not any jurisdiction; but that questions of this nature were always decided by some king's counsel, to whom the matter was referred; which course had, on the present occasion, been adopted by a reference to Mr. Bell. Mr. Montague stated that this question had been fully discussed and settled by Lord Eldon in *Ex parte Lloyd*. There being some doubt as to the fact, it stood over until the next day, when Mr. Montague appeared for the petition.

The following is the report of the above mentioned case: —

Ex parte Lloyd, Nov. 5. 1822. This was a petition presented to restrain Mr. Montague from acting as counsel on behalf of a bankrupt, from whom he had received a retainer after he had acted as counsel against him on the retainer of a Mr. Lloyd. Mr. Montague had received a retainer with the usual fee of one guinea, and had repeatedly acted under that retainer of Mr. Lloyd, against the bankrupt. The meetings were adjourned from time to time. In the interval, after one of the adjournments, a general retainer was left on behalf of the bankrupt. At the next meeting of which Mr. Lloyd's solicitor had notice, they did not send any brief. The bankrupt did send a brief, and, as a right, claimed Mr. Montague's assistance. He attended before the commissioners as counsel for the bankrupt. This was a petition to restrain him from so acting. The questions were two: 1st, For whom, under the circumstances of the case, Mr. Montague ought to act as counsel; and, 2dly, Whether the Lord Chancellor had jurisdiction upon the subject. Upon opening the petition, the Lord Chancellor expressed his clear decided opinion, that he, sitting in bankruptcy, had no jurisdiction whatever to interfere with a barrister in the exercise of his discretion as to the client upon whose retainer he might think proper to act; but upon Mr. Montague's soliciting his Lordship to hear the petition, as it was upon a subject unsettled, and of importance to the bar, his Lordship was pleased to say that, as "*Amicus Curiæ*," he was ready to hear the petition. After having heard Mr. Horne and Mr. Pepys in support of the petition, and the Attorney-General, and Mr. Treslove, and Mr. Parker, as counsel for Mr. Montague; and after having heard Mr. Montague as counsel for the bankrupt, his Lordship declared that Mr. Montague was bound, under the circumstances of the case, to act as counsel for the bankrupt, and dismissed the petition. The argument was in substance as follows: — From the constitution of our Courts it has been deemed expedient, for the purpose of eliciting the truth, both of law and of fact, that the Judge should hear the most powerful opposite statements of experienced men, who are more able to do justice in a public assembly to the cases than the suitors themselves. The

wisdom of this expedient may be easily illustrated. If a Judge is called upon to decide on any doubtful question, in chemistry for instance, would it not be desirable that he should hear the conflicting statements of two eminent chemists? or in a doubtful question of insanity, to hear the opposite sentiments of two eminent physicians? or in a question of fracture of a limb, the opposite sentiments of two eminent surgeons? Assuming that the truth will be best discovered by the conflicting reasons of men disinterested in the event of the suit, there are certain rules by which, for the attainment of this object, the practice of the Bar is regulated; and amongst the most important of these rules, which, till this petition was presented, no suitor has attempted to interfere, it is established,

First, That a barrister must not exercise any discretion as to the suitor for whom he pleads in the Court in which he practises.

Secondly, A barrister is bound to act for the party for whom he is retained, as long as his services are required, and no longer.

Thirdly, The disputes between different suitors, as to the right of retainer, must be decided, not by any public tribunal, but by the barristers themselves.

Each of these positions seems to be of sufficient importance to require a separate investigation.

I. A barrister ought not to exercise any discretion as to the suitor for whom he pleads in the Court in which he practises.

If a barrister was permitted to exercise any discretion as to the client for whom he will plead, the course of justice would be interrupted by prejudice to the suitor, and the exclusion of integrity from the profession. The suitor would be prejudiced in proportion to the respectability of the advocate, and the weight of character of counsel would be evidence in the cause. Integrity would be excluded from the profession; as the counsel would necessarily be associated with the cause of his client, with the slanderer, the adulterer, the murderer, or the traitor, whom it may be his duty to defend. To a barrister, therefore, it is a matter of indifference whether he appears for the most unfortunate or the most prosperous member of the community, for the poorest bankrupt, or the noblest peer of the realm. He lends his exertions to all, himself to none. The result of the cause to him is a matter of indifference. It is for the Court to decide. It is for him to argue. He is, however he may be represented by those who understand not his true situation, merely an officer assisting in the administration of justice, and acting under the impression that truth is best discovered by powerful statements on both sides of the question.

II. A barrister is bound to act for the party for whom he is retained, as long as his services are required, and no longer.

If a client were at liberty to avail himself of the assistance of a barrister during part of the cause, and then to reject him, without liberty to the opposite party to insist upon his services, the poor would be defenceless. This, which is not an imaginary, but a real evil, may be explained by two cases which have happened within our own time. In the case of *Mr. Shelley*, argued in this Court a few years ago, all the king's counsel were retained against Mr. Shelley. In a cause in which, some years since the orphan children of the late Lord Lonsdale's agent were the plaintiffs in a suit instituted against that nobleman to obtain payment of a debt, which was all the property they had in the world, the defendant retained all the counsel at Carlisle. The Judge refused to try the cause. The children were, during the life of Lord Lonsdale, deprived of their property, and exposed to great inconvenience. The whole, with the interest and all the costs, was voluntarily restored to them by his noble successor, the present Lord. Will it be contended that opulence can possess this power merely by sending one brief to a counsel at the commencement of a suit, and then rejecting him?

III. The disputes as to different retainers must be decided, not by any public tribunal, but by the barristers themselves.

First, for the necessity of expeditious decision; and, secondly, because the bar is the most expeditious tribunal; and, thirdly, because the Chancellor has not jurisdiction.

From the very nature and frequency of these disputes, it is absolutely necessary that more expedition should be used in these decisions than can be expected from any public tribunal. When a cause is standing in the paper for trial, is the suitor to be deprived of his counsel until an answer is put in to an injunction filed by his opulent opponent? Is the business of the circuit to stand still; or are causes to proceed, or to be delayed, at the option of a suitor who may file his bill in equity? The delay unavoidably attendant upon the possibility of procuring decisions in these cases, is in itself satisfactory proof of the wisdom of the practice which from

time immemorial has existed. But even if the Court of Chancery were capable of proceeding with the requisite despatch which the urgency of these cases requires, the power of this Court would not be as efficacious as the decision of the Bar upon the conduct of one of its own members. Of the power of this tribunal, no man, who reflects upon the intellectual and high feeling with which the Bar abounds, can entertain any doubt. Doctor Paley, when speaking of the power of the Bar, says, "The opinion of the Bar concerning what passes will be impartial, and will commonly guide that of the public. The most corrupt Judge will fear to indulge his dishonest wishes in the presence of such an assembly; he must encounter what few can support, — the censure of his equals and companions, together with the indignation and reproaches of his country." If such is the power of the Bar over the Bench, who can doubt its efficacy over its own members? For these reasons the Bar is the proper tribunal to decide; and a barrister to whom the case is referred is the proper judge.

Such being the doctrine with respect to retainers, it may be some use to explain what does and what does not constitute a retainer. The true meaning of a retainer cannot be mistaken. It is an engagement for the assistance of a barrister, either generally in all cases in which the client may be engaged, or in some particular cause to which the retainer is specially limited. It is a declaration by the client, that he at all events intends to send a brief to the counsel whom he has retained. It is an absolute, not a conditional engagement. If, by accident, the client omit to send a brief, and a brief is tendered by the opposite party, courtesy requires that notice should be sent to the retaining client; but if the retaining client intentionally omit to send a brief, such notice is not only not requisite, but is improper. The engagement is not conditional. Such being the nature of a retainer, it remains to explain some erroneous opinions which exist respecting acts which have been supposed to amount to retainers. These are: —

1. Advising.
2. Drawing pleadings.
3. Retainer without an intention to send a brief, unless the opposite party sends a brief.
4. Retainer, with the intention to send a brief not during the whole progress of the suit, but only occasionally.

Each of these acts is at different times supposed to amount to a retainer; but they are all improper: the two first generally originating in mistake; the two last in a practice which cannot be sanctioned. A moment's examination of each of these acts will show its true nature.

1. *Advising.*

A client confers with a barrister whose judgment he respects; he states his case; the barrister communicates his opinion, and the conference is terminated. This does not amount to a retainer. There is no obligation upon the client to employ, as an advocate, a barrister whom he values solely as a chamber counsel. Nor is the advocate restrained from acting for the opposite party, who may entertain different sentiments of his attainments.

2. *Drawing Pleadings.*

A party states his case. The pleading is drawn; the barrister has discharged his duty, and his engagement is terminated. This does not amount to a retainer. There is no obligation of the client to employ, as an advocate, a barrister whom he values only as a draftsman; nor is the advocate restrained from acting for the opposite party, who may entertain different sentiments of the barrister's attainments. In each of these cases, the intercourse between the client and the barrister has been sometimes imagined to amount to a retainer, from the confidential knowledge which the advocate possesses of the case against which he is to plead; and there is some appearance of reason in this supposition. It is, however, nothing but appearance; and even if it really existed, the perplexity is occasioned, not by the fault of the barrister, but of the client. It is nothing but appearance, for there is no probability that the barrister will reveal any communication which has been made to him in confidence. He has no interest in the event of the suit. He is merely the organ by which the suitor states his case; and he acts only from his instructions. He has no knowledge but what his brief conveys. If the client quit his advocate, which he is at liberty to do, he must trust, and he may safely trust, to the honour and integrity in which he at first confided. There is no temptation to violate the confidence reposed; and even if the temptation existed, it is checked by the most powerful of all checks, the consciousness of the immediate disapprobation of the whole profession. But even if

this danger do exist, it must be remembered, that the perplexity is occasioned, not by the fault of the barrister, but of the client, who was at liberty to command the professional assistance of the advocate; and not having done so, either from intention or from accident, he must take the consequences of his own conduct, or the Bar must be lowered to the necessity of asking for fees for retainers, or for briefs. It may be said in this case, as was said by the Lord Chancellor in the case of *Goodhart* v. *Lowe*, 2 Jacob, 352., "It is too much to expect the Court to take care of the property of persons who will not take care of it themselves."

The next species of improper retainer is,

3. *Retainer, without intention to send a brief unless the opposite party sends a brief.*

"Retainers to your enemies, and briefs to your friends," Sir Samuel Romilly used to say, "was a disgraceful proceeding, of which he was aware, and which ought to be resisted." There is not, in this case, any courtesy which requires notice to be given that a brief is sent by the opposite party; the only difficulty is of discovering the fact of the intention with which the retainer is delivered.

4. *Retainer, with the intention to send a brief, not during the whole progress of the suit, but only occasionally.*

These intermittent retainers are, of course, improper.

See petition from Antigua, 1 Knapp, 267.

HINTS ON LEGAL EDUCATION.

To the Editor of the Legal Observer.

Sir,

The following hints on legal education, which are transcribed from a valuable and rare work in my possession, strike me as judicious and pertinent, and as such, I beg leave to offer them for the inspection of your readers.

Yours, &c.
H. B. A.

"The course of study that strikes me as the most eligible to attain the qualifications necessary for the profession of a barrister, and the most likely to render the path of legal knowledge less thorny and laborious, nay, even strew some flowers in that barren and inauspicious road; but which I, with diffidence, submit to the consideration of wiser men than myself in the science of education; and which, as in almost direct opposition to the *dictum* of the immortal Blackstone, (whom no student but must revere, and who is above all gratitude, as he is above all praise,) cannot but be advanced with all that hesitation and embarrassment which a scholar must feel in combating his master's favourite proposition:—this course, then, would be, after having given my pupil the usual education that a good grammar school affords, and made him complete master of the French and Latin languages; in the intervals of which study, and as an assistance to it, an arrangement of such law maxims as have any pretence to purity of diction, and other books of that nature, might be put into his hands; to bring him acquainted with some of the leading features of the law, and enable him to read, with greater pleasure and improvement, Blackstone's Commentaries, which is one of the very first books which should be put into his hands. Having thus given him some insight into the nature of the law, I must confess I do not think any step more proper to be taken, either with a view of increasing his stock of knowledge, or as calculated to give him a proper idea, accompanied with habits of business, than to place him, at sixteen years of age, in the office of an attorney of general practice for three years, to see the mode in which business is carried on, the different offices through which a cause passes, and to trace it practically from the writ to the verdict. He may there likewise, at his leisure hours, take precedents and notes in the particular line for which he is intended, and read the best elementary and theoretical treatises of the law, such as Wooddeson's Vinerian Lectures, Fonblanque's Treatise of Equity, and Reeves's History of the English Laws, (which last, dry and repulsive as it certainly is, may be considered as an indispensable preparation to the well understanding of *Coke*,) till he finds himself competent to the perusal of the Commentary on Littleton, and the other works of that great ornament of English jurisprudence. These latter I would not have him hastily attempt; for should he then find himself unequal to the task, he might relinquish it with a disgust that might deter him from the attempt another time, when he would find himself better able to understand them. He should, therefore, wait with patience till he finds himself capable of bestowing all that attention on them which they fully require. In fine, when he should have acquired habits of steadiness and application, which would render him superior to dissipation and frivolity, which draw so many young men, formed for a higher sphere of action, into their destructive vortex to the complete disappointment of their friends, and to their own ultimate regret and vexation, and not until then, would I place him with a special pleader for three years more, to copy precedents and draw pleadings, the reason and grounds of which he would now understand; to read all the modern, and a few ancient, Reports, and such other books as his own judgment will point out; and if, at the end, he does not find himself equal to the duties of a counsellor, he must, by persevering industry and assiduity, gain what has been denied him by nature, either in quickness of perception or retention of memory."

COPYHOLDS. — TENANT FOR LIFE, AND REMAINDER-MAN.

To the Editor of the Legal Observer.

SIR,

I AM desirous to elicit from yourself, or your learned contributors, an opinion upon a subject which admits of much doubt, and challenges much argument. I allude to the proposition; that "the admission of a tenant for life, or years, is the admittance of all in remainder." Mr. Serjeant Scriven, in the second edition of his Treatise on Copyholds, says, "it has long been so settled;" and in the same page asserts that "a custom for tenants in remainder to come in and be admitted, and *pay a fine*, has been held *to be good;*" and refers his readers to a variety of cases in support of the opinion he has laid down. Now, Sir, it appears to me, that the two quotations are in contradiction to each other—at all events, that an absurdity appears upon the face of them; for why should *custom* (at all times reprehensible when it militates against improvement) be allowed to prevail against a "long settled" maxim. We know that different manors have their different customs; but they are merely (with a few *exceptions*) mechanical regulations, and ought not to affect a principle of the law of copyhold property, which involves a great pecuniary consideration. I have been led to these remarks by a transaction within my own knowledge; and I relate it, for the purpose not only of illustrating, and, if possible, strengthening the position I take, but to promote amongst your readers a research into the merits of the case propounded. It is this:—*A.* by her will devised certain copyholds to *B.* and *C.* his wife, for their lives, with the benefit of survivorship; and, after the death of their survivor, to their children, as tenants in common. *B.* and *C.* were admitted, and paid *a full fine*. *C.* survived *B.*, and left *seven* children by *B.*, and was admitted thereto as the *survivor of her husband*. After the death of *C.* the children were admitted, each to a seventh portion of the whole of the property in question, with the exception of *one acre one rood and twenty-four perches*, which, from the lack of vigilance, I presume, on the part of the steward of the manor, were not recognised till many years afterwards. However, the steward for the time being discovered the omission, and, as he was in duty bound, called upon the parties "to come into Court, and be admitted," in the usual way. The consequence was, the *seven were* admitted to the one acre one rood and twenty-four perches, and, after paying upwards of thirteen guineas for the fine and fees, were obliged to submit to the additional burden of an *eight years' quit rent*.

The questions therefore, are, whether the admission of *B.* and *C.*, the tenants for life, was not the admittance of their children? and whether what has been "held *to be good*," can by any interpretation be construed into a *right?*

For one, Sir, I am a great enemy of the copyhold tenure generally. It takes its origin from the "dark ages," when "the greater barons granted out smaller manors to others, and the seigniory of the superior baron, or lord paramount, was termed an *honour;*" and I do sincerely hope that, at no distant day, these feudal remains will at once be removed from the face of the earth. It is certainly one great consolation to be told, that "a manor cannot now be created, not even by the king himself, *length of time being the very essence of a manor;*" and as our laws have wisely prescribed a barrier to the erection of a fresh abuse, which these enlightened times would themselves forbid, let us sacrifice those which I complain of as soon as possible.

Your friend and reader,

ASPIRO.

August 16. 1831.

COSTS UNDER THE NEW RULES IN THE COMMON LAW COURTS.

MANY enquiries have been made of us regarding the increase of costs in consequence of the alterations in the forms of the declarations. It has been stated, as we announced some time ago, that the Judges intended to revise the rules of taxation. This was naturally anticipated from the declared opinions of the Common Law Commissioners; and four of them having been elevated to the bench, we presume their recommendations will acquire additional weight.

Some of our subscribers, however, very reasonably observe, that as the new rules have come into *immediate operation* with respect to the abridgment of the pleadings, the allowance for professional trouble (not now adequately remunerated) ought *not to be delayed*. We shall resume this subject at an early opportunity; and if no satisfactory intelligence can be obtained, we should advise a memorial to the Judges to be numerously signed, and let it be presented after the termination of the circuits, and a copy submitted to each of their Lordships, in order that the subject may receive their mature consideration. We understand there is every disposition, in the proper quarters, to do justice to the practitioners; and we are sure, that if their fair claims be not attended to, the interests of the suitors, and the ends of justice, will unavoidably suffer.

NOTES OF THE WEEK.

FRAUDULENT DEBTORS BILL.

LORD *Tenterden* has moved, that there be laid before the House of Lords an account of the names and numbers of prisoners confined in execution for debt in the King's Bench and Fleet prisons; with a statement of the sums for which they were confined, and whether they had instituted any, and what, proceedings under the Insolvent Debtors Act.

We trust the information to be thus derived will elucidate the subject of Lord *Wynford*'s measure, and enable the public and the profession to form a better judgment than they are at present enabled to do. The great change which is projected ought certainly to be viewed with reference to the extent of the evil which it is designed to remove, and every possible information should be collected before the bill be passed.

ARBITRATION AND INTERPLEADER BILLS.

We are glad that these measures are again brought forward. Lord *Tenterden* moved the second reading of the bills last week, and they were ordered to be committed. They have subsequently gone through the committee, and the reports were ordered to be brought up. The analysis of these bills will be found in Vol. I. pp. 39. 52.

TITLES BY PRESCRIPTION.

Lord *Tenterden* has also introduced a bill, the same as the one brought in last session, for altering the time of prescription; an analysis of which we gave in Vol. I. p. 344.

BANKRUPTCY COURT BILL.

It appears that the Lord Chancellor, at the request of the Earl of *Eldon*, has postponed the further proceedings on this Bill until Tuesday, the 13th September.

LAW OF SEWERS.

Mr. *Hodgson* has given notice of a bill to amend the law of sewers.

SUPERIOR COURTS.

LORD CHANCELLOR'S COURT.

PRACTICE. — DEMURRER. — REVIVOR.

If a bill is filed to compel the specific performance of an agreement, and then abandoned by agreement, a demurrer will lie to a fresh bill filed to have the benefit of the former suit. The proper course, in case of deaths of parties, is to revive the suit.

In this case, a bill was filed for the specific performance of an agreement, by which the plaintiff contracted to purchase of the defendant's father certain estates for 90,000*l*. Objections were taken to the title, and the vendor proceeded to recover possession of the estates he had agreed to sell; and to restrain these proceedings at law was one of the objects of the bill. In 1818 the parties had come to an understanding, and agreed in writing to put an end to the suit, and arrangements were made for the payment of the purchase-money. The plaintiff afterwards disputed the agreement, on the ground that certain facts had been excluded from him at the time he entered into it, and he thereupon filed a new bill, praying that he might have the benefit of the former suit. To this bill the defendant demurred. The *Lord Chancellor* thought that the demurrer was good. What was there in the practice of the Court to prevent the plaintiff from reviving his suit? The agreement by the parties was not of force to put an end to any suit; for it could only be terminated by an order of the Court dismissing the bill. The suit was not extinct, though it was suspended by the agreement; but any of the parties could put it in action again at any time he should think fit. The demurrer was accompanied by a very short answer, which could not be considered as an answer to the bill, and which, it was said, was resorted to for the purpose of evading the general rule that a defendant under such terms shall not demur alone. If there was any thing informal in the demurrer, the application should have been to take it off the file, or that it should be treated as a nullity. His Lordship therefore dismissed the appeal. — *Craig* v. *Earl of Onslow*. L. C. June 9.

PRACTICE. — DECREE.

If a particular fact is given in evidence at the hearing, but is omitted in the decree, the defect may afterwards be supplied, and the fact inserted.

In this case it had been held necessary to give evidence that one of the parties was executor; and for this purpose the probate had been produced, and was said to have been in Court at the hearing, but it was not entered in the decree. When the decree was drawn up, the errors arising from that omission became apparent, and upon this ground the appeal was brought. The respondent then applied for leave to give in evidence upon the appeal the probate that had been so omitted. His Lordship thought upon looking through the cases that he was entitled to do so; and the grounds upon which the decree had in fact been made, being thus proved in evidence, the decree must be affirmed, and, considering the cirumstances of the case, without costs.—*Peters* v. *Pickering*. L. C. June 9. 1831.

PETITION. — CHARITY. — TRUSTEE.

Semble, The trustee of a charity may act as its tradesman if he has been employed as such before he was appointed trustee, and if the accounts are not audited by the trustees.

Mr. *Solicitor-General* appeared in support of a petition presented under a local act of 7 Geo. 4. complaining that the trustees of this charity were availing themselves of their office of trustees to derive individual profit and emolument from its funds, and making appropriations of the charity fund not warranted by the letter or spirit of the act of parliament which regulated it. This charity, now having an income of 7000*l*. or 8000*l*. a year, was originally confined to a school in the town of Bedford, erected under letters patent granted by Edward VI. In 1566 it was most splendidly endowed by Sir William Harpur and Dame Harpur his wife, and was from time to time regulated by several acts of parliament.

The act 7 Geo. 4. contained improved regulations: it appointed for trustees the Lord Lieutenant and two members for the county, and the two for the town of Bedford for the time being, together with the master and usher of the school, the Mayor, Recorder, and all others of the corporation, and eighteen of the substantial inhabitants of the town. Rules were laid down for the annual resignation of the latter, and the election of others in their place. None of them were to have any office of profit in the charity, or partake of the funds. It appeared, however, that several of the trustees did partake of the charity funds. He wished not to be understood as making any imputation upon these gentlnmen, for he did not intend any such thing; he wanted a declaration from this Court, in accordance with the prayer of the petition, that the trustees of this charity should not themselves have any appointment under it, or partake of its profits in any way. This Court never allowed any trustees to have profit in the execution of the trust. The petition set forth that the Mayor of Bedford (Mr. Elgar), one of the trustees, had been paid a bill of 444*l.* for buildings and repairs under contract with his co-trustees; that Mr. Webb, an inhabitant trustee, for books and stationery supplied to the schools, had 300*l.* odd; that Dr. Short, an alderman and trustee, had 60*l.* for a year's attendance on the children in the school. The petition prayed for an account against all these. Another part of the petition complained of 500*l.*, which was directed by the 19th rule of the act to be given to poor housekeepers yearly, being applied to the payment of rates of householders rated at 5*l.* and under.

Mr. *West* and Mr. *Williamson* followed on the same side.

Sir *Edward Sugden*, on the other side, contended that there was nothing in the conduct of these trustees derogatory from the proper performance of the charity. Nearly all the substantial people of the town of Bedford, including the tradesmen, were liable to act as trustees, and they could not refuse. These persons now complained of by the petition, as making profit of their trust, were the tradesmen employed in the same way before they were made trustees. They had no office in the execution of the trust. Mr. Elgar did repairs and built as a man of business. Mr. Webb was continued to supply stationery. The charity was not to have new tradesmen every year, when the former tradesmen might be called on to act in the trust. The very act of parliament which joined the master and the usher of the grammar school to the trustees, proved that persons deriving profit from or partaking of the charity might be trustees at the same time. No other tradesmen could be found in Bedford, not included among the trustees, to do the business better or cheaper for the charity than both Mr. Elgar and Mr. Webb. As to the apothecary's bill for medical attendance, it did not amount to more than a few shillings for each person in the school.

Mr. *Pepys* and Mr. *Stevens* followed on the same side. They contended, that the persons employed to do work and supply all matters to the objects of the charity were the best as well as the most moderate-priced tradesmen that could be found. When these gentlemen were obliged, by virtue of their office, or by being respectable inhabitants of Bedford, to become trustees of this charity, they were not to sacrifice their business as tradesmen. As to the medical men, the most skilful that could be had in the town, even on the score of economy, were also the best that could be employed. This Court could not go beyond the limits prescribed by the act of parliament, and could not interfere if nothing was done contrary to the provisions of the act. In the case of *Naylor* v. *Rich* it was decided that a trustee was not prevented from dealing. In this matter there were forty-seven trustees, a sufficient number to watch tradesmen's bills, which were also audited by a committee of the trustees. All their acts were public, and all the inhabitants knew what was done. The best proof of the upright conduct of the trustees was, that they were re-elected. This petition was signed by only seven inhabitants, none of whom were trustees. The officers mentioned in the act of parliament could not comprehend tradesmen. The medical gentlemen could not be supposed to have held a place of profit.

Mr. *Solicitor-General* was heard in reply.

The *Lord Chancellor* gave judgment. He was glad that he was not obliged to resort to the principles upon which this Court acted in the trusts of charities in coming to a decision upon this petition. The principle of this Court was very clear, that no person who acted as a trustee should make any profit of the execution of his trust. There was not any decision to the contrary of that principle, as far as he was aware of. But in this case the act of parliament of the 7th of Geo. 4., which contained a code of regulations for this charity, afforded a guide for his judgment. There were three principal points made the subjects of complaint. The first was the application of 500*l.* to the payment of the highway-rates for houses under a small rent, the 19th rule in the act directing that sum to be paid yearly to poor householders in the town of Bedford. The second point related to the 9th section of the act, which said that no one should be a trustee who held office or place of profit under, or partake of, the charity. The third was on the 25th rule of the act, which related to contracts with persons for the charity. With respect to the application of the 500*l.*, under the 19th rule, the powers and discretion given to the trustees brought within it the application they made of that sum. As to the holding of places of profit under the charity, tradesmen could not be said to hold such an office or place. A tradesman would not be spoken of as "resigning," or being "removed," but as "ceasing to work, or to supply, or be employed, or dealt with," or as "striking." So that clause of the act could not apply to tradesmen. But the doctor, who received so much a year for his attendance on the schools of this charity, may be said to have a place of profit, and an office. The last point respected the Mayor of Bedford, who contracted for building-work, and the stationer who supplied the school, both of whom were trustees. He did not limit the contract in the 25th rule to contracts for 100*l.*; but, taking

it in a general sense, whether over or below that sum, and whether for ordinary or extraordinary work, he was of opinion that the 9th section of the act, coupled with this 25th rule, did exclude the Mayor, a trustee, from being employed in works of the charity.—He was clear that the words "partake of the profits of the charity," in the 9th section, had reference to the holding of a place or office of profit; and he did not think that the stationer who supplied the stationery and books, not by contract, but as they were required, came within either that section or the 25th rule; but if he found that the trustees continued to employ themselves, and to audit their own accounts with the charity, the Court would give such directions as would exclude that practice. The trustees might, whenever they had a doubt, apply to this Court for directions. His Lordship then handed down a paper containing written directions which he had drawn up, and both parties to this petition might take copies of them.—*In re Bedford Charity.* L. C. July 10.

ROLLS COURT.

TRUST.—INTESTACY.

If a person resident in a foreign country gives a direction to trustees to invest, and dies before the investment is made, if the trustees could not have learnt his death, but make the investment, the Court will not disturb it.

In this case Lieutenant Colonel Hughes, being at St. Germain en-laye, in France, and in an ill state of health, wrote to his nephew, the defendant, requesting him to act with two other gentlemen as trustees in the disposition of a sum of 4000*l.* for which his, Colonel Hughes's, commission had been sold; that is, to invest the money, and to pay the interest thereof to Colonel Hughes for his life, and after his death to divide it equally between two of his children. The defendant accepted the trust, went to London, and joined with the other trustees in the investment of the money. Before, however, the investment was made, Colonel Hughes died, although the trustees were ignorant at the time of the fact; and the question was, whether the act of the trustees must be considered incomplete by the death of Colonel Hughes, and must not declare Colonel Hughes to have died intestate.

The *Master of the Rolls* said, that if a power were duly given to persons to apply a sum of money in a certain manner, if it were so applied after the death of the principal in the transaction, but in a country where it was impossible for the persons so empowered to be aware of that event, he was of opinion that a court of equity would not undo what had been done; and the courts of law, he believed, would act in a like manner.—*Hughes* v. *Warmsley.* M. R. June 6. 1831.

BEQUEST.—CHARITY.

When a testator directs that the sum of 10,000*l. shall be raised out of his real and personal estate, and divided among certain legatees, among the rest, to several charities, and then bequeaths the residue of his property to his wife, on condition that his legacies are all paid: Held, that the legacies are charges on, and not exceptions from, the gift of the residue.*

In this case the testator in the cause gave and devised to his executors all his freehold and leasehold estates, in trust, that by sale of his personal property, and so much of his real estates as might be necessary, they should raise a sufficient sum to purchase 10,000*l.* in the 5 per cent. consols; and having apportioned this sum of stock among different legatees, and, amongst others, to several charitable institutions, he gave to his wife the rest and residue of his estate and effects of every kind, on condition that all his legacies were paid. The charitable legacies failing, of course, as far as they affected the real estates, the question was, whether the legacies were to be considered as exceptions from the gift to the wife, or as charges upon the gift. The *Master of the Rolls* was of opinion, that they were to be considered as charges only, and not as exceptions from the gift. The condition to pay the legacies, he considered, did not make any material difference; they were only chargeable upon the gift to the wife.—*Cooke* v. *Stationers' Company,* M. R. June 21. 1831.

BEQUEST.—CONSTRUCTION.

Where there is a direction in a will that all the property shall be divided between the testatrix's sister, her nieces, and her grand-nieces, with reference to their peculiar circumstances, a grand-niece born after the testatrix's death will not take along with the others.

This was a bill filed for the purpose, amongst other things, of having the opinion of the Court upon the following clause in the will of the testatrix:—"I direct all my property to be divided between my sister, my nieces, and my grand-nieces, as they are most in need of it. I could have wished my sister to have had the interest of it for her life, but the poor girls must be in want of it." A child born some months after the testratrix's death was one of three grand-nieces; and the question was, whether the child took under the general description.

Mr. *Treslove* contended that the case involved the doctrine with respect to children *in ventre sa mere;* that the child in that state of existence was a living child as much as if it were actually born, and that therefore it should take under the general bequest.

His *Honor* said that the doctrine respecting children *in ventre sa mere* had no application whatever to the present case. The question here was one purely of intention; and it was not possible to suppose from the words which the testratrix had used, that the direction which had been given for the immediate division of her property at her death could be delayed to the end of nine months, in order to determine whether there might be any other person entitled under the general description in her will. By the expression, "the poor girls must be in want of it," it appeared, besides, that the gift was made in respect of persons whose circumstances were then known to the testatrix; the after-

born child, therefore, could not take.—*Doe* v. *Smith*. M. R. June 10. 1831.

VICE-CHANCELLOR'S COURT.

SUPERSEDING COMMISSION.

Where a commission has been directed to two creditors of the bankrupt as commissioners, it will be superseded.

Mr. *Knight* (with whom were Mr. *Montagu* and Mr. *Jacob*) applied to the Court, on behalf of the petitioner in this case, to supersede the commission which had been sued out in the country against the bankrupt. The main ground of this application was, that two of the commissioners, to whom the commission was directed, were creditors of the bankrupt; and therefore, from the decided interests they must have in the commission, they were not in a fit situation to be commissioners on that commission: one of the commissioners was an accounting party with the bankrupt; and the other held a joint promissory note of the bankrupt's with two other persons, and which claim he did not intend to forego.

Mr. *Rose* was heard in opposition to the petition, and contended that the Court ought not, in such a case as this, where it appeared there was no blame attachable to either the petitioning creditor or the solicitor of the commission, to supersede the commission with costs as against the petitioning creditor. The Court never superseded such a commission, except where fraud or misconduct was shown on the part of the persons suing out the commission: here there was an absence of all that; and, although there were two of the commissioners who, it appeared, were creditors, the solicitor of the commission stated that he was not aware of that fact at the time the docket was struck. The counsel contended that, if the Court did any thing, it would only be to renew the commission to his client, the original petitioning creditor, other commissioners being substituted for those two who were objectionable.

The *Vice-Chancellor* was of opinion that this was a commission which ought never to have been granted. For the grounds stated, the existing commission must be superseded with costs. *Ex parte Kemp. In re Lodge*. V. C. June 28. 1831.

COURT OF KING'S BRNCH.

SHERIFF.—PROCESS.—DEFENDANT'S PLACE OF ABODE.

The sheriff is not bound to execute bailable process on which the place of abode and addition of the defendant is not indorsed.

Turnor showed cause against a rule for discharging a rule calling on the sheriff of Denbighshire to return the writ issued against the defendant. The rule had been obtained on the ground that the addition of the defendant had not been indorsed on the writ, according to the rule of the 2 & 3 Geo. 4. H. T. 1822. The question is, whether the sheriff is to be allowed to take advantage of this error now. He made no objection to receiving the writ at the time of its delivery to him, on account of the want of addition. He did not say that he would not be able to execute it. The only objection he made to it was, that under the 7 & 8 Geo. 4. c. 71. § 7., a resident *in* Denbighshire could not be arrested for a less sum than 50*l*., while the present writ was only indorsed for 20*l*. That objection, is, however, removed by the 11 Geo. 4. and 1 Will. 4. c. 70. § 13.* Now, in the case of *Clarke* v. *Palmer*, 9 B. & C. 153., where a *ca. sa.* was lodged with the sheriff, and there was no description of the defendant's address or place of residence indorsed on the writ, Lord *Tenterden* said, "I by no means lay it down as a general proposition, that in all cases where a writ has been lodged by the plaintiff without the indorsement required by the rule of Court, and the sheriff has received that writ without objection, the Court will interpose, and set aside the writ." Here no objection was made, and therefore it comes within the principle of *Clarke* v. *Palmer*.

Cottingham, contrà, was stopped by the Court.

Taunton J. The sheriff is not bound to go about the county to seek a party who is thus generally described. The object of the rule was to prevent the mistakes that might be made in consequence of so general a description. He is not bound to do any thing upon it, unless there is a good description of the defendant in the writ.

Rule absolute.—*Kenrick* v. *Nanney*. E. T. April 28. 1831.

SERVICE OF DECLARATION IN EJECTMENT.

Where the service of a declaration in ejectment was on a daughter of the tenant in possession, the Court held the service insufficient, as the affidavit did not state that the party serving it believed that the tenant in possession was in the house at the time.

Chilton moved for judgment against the casual ejector. The declaration had been served on a daughter of the tenant in possession, who stated that her mother was in the house, but that the party serving the declaration would not be allowed to see her; upon which he proceeded to read the declaration and notice to the daughter; and upon his quitting the house, the declaration was flung after him by her into the road.

The Court held the affidavit to be insufficient, as it did not state the belief of the party serving the declaration that the tenant in possession was actually in the house.—*Doe* d. —— v. *Roe*. T. T. June 22. 1829.

CONCURRENT WRITS.—BAILABLE AND SERVICEABLE PROCESS.

If a plaintiff sues out serviceable process, and without discontinuing, sues out bailable process for the same cause of action, the defendant may plead the pendency of the former suit, and the Court will not relieve the plaintiff.

Hoggins moved for a rule to show cause why, in the case of two actions depending for the same cause, the plaintiff should not be at liberty either to discontinue the first action, as of Hilary term last, or why the defendant's plea

* See 1 Dowling's Statutes, 378.

of the present term should not be taken off the file. In the first action the process was serviceable; in the second it was bailable. We have not discontinued, and the defendant now pleads the pendency of the former action. In the case of *Bishop* v. *Powell*, 6 T. R. 616., Lord *Kenyon* was of opinion, that where the first process was serviceable, and the second, bailable, the proceedings were regular.*

Taunton J. If the plea is bad, you can reply it over. The defendant has a right to plead the pendency of the first action. I cannot assist you.

Rule refused. — *Prescott* v. *Stevens*. E. T. April 28. 1831.

MINOR CORRESPONDENCE.

EXPENSE OF A LAW LIBRARY.

MR. EDITOR,

I AM desirous to become thoroughly acquainted with the principles of the law, and, having read a course on its various branches, am desirous to retrace my steps with greater care, reading the leading cases on each of the more important points. For this purpose a library of Reports is indispensable; but my means, in common with those of most professional gentlemen of my standing, render such an acquisition hopeless: the consequence is, that the energies of the mind frequently force themselves into channels less conducive to the interests and respectability of the professional character than the desideratum in question. This subject is alluded to in your last, in answer to a communication of your correspondent W. S., but you do not say whether the Law Institution will be open to any others than *actual shareholders*. For my own part, I cannot afford to purchase a share, but would not hesitate to strain a point towards an annual subscription.

A note in reply will much oblige many others besides

Your constant Reader,

Aug. 17. 1831.

ISÆUS.

*** The committee of management of the Law Institution are authorised by the deed of settlement to admit persons as annual subscribers to the several departments of the Hall, Library, and Club-room. The shareholders are limited to attorneys, solicitors, and proctors; but there is nothing in the deed to prevent any student of either branch of the profession from being admitted as a subscriber: this depends on the determination of the committee.

ANSWERS TO QUERIES.

NEW RULES. — DECLARATIONS. P. 223.

IN answer to the query of your correspondent F. H. I beg to observe, that it does not appear to me the new rules have in any respect varied the practice that has prevailed since the passing of the stat. 2 Geo. 4. c. 78., which was enacted in consequence of the decision in *Rowe* v. *Young*, 2 Brod. & Bing. 165.; and that, if the acceptance be really a *special* acceptance within the provision of that statute, an averment of presentment is necessary, and will be allowed by the Master in costs; but if it be a *general* acceptance, no such averment is requisite. The forms in the schedule to the rules will be amply sufficient, and it will, I imagine, be compulsory on the Master to disallow the costs of the averment.

In nearly nine cases out of ten, acceptances may be considered *general;* and no averment of presentment, therefore, necessary: for the stat. referred to enacts, that bills accepted payable at the house of a banker or other place, *without further expression in the acceptance*, shall be deemed, to all intents and purposes, *general* acceptances; but that, if the acceptance shall specify that the bill is to be "payable at a banker's house or other place *only, and not otherwise or elsewhere*," it shall be deemed a *qualified* acceptance, and the acceptor not liable, unless it shall have been presented and payment demanded at the place where made payable. It is very rarely, however, that bills are accepted with this particularity.

J. B. S.

QUERIES.

BAILABLE ATTACHMENT. — EXCHEQUER.

ARE bail, when sued on their recognizances, liable to be arrested on an attachment for not appearing to a subpœna issuing out of the Court of Exchequer, the debt and costs in the original action being upwards of 60*l.*? The Court, it will be recollected, made an order in Trinity term last, that no arrest should be made under any writ of attachment for non-appearance to a subpœna, unless the same should be for a bailable cause of action, and should be duly marked and indorsed for bail. If they may be arrested, is any affidavit that the debt and costs remain unpaid necessary? and who is the proper person to make it?

W. S.

SUB-LESSEE.

A lessee underlet to two tenants: to *one*, the upper part of the house, for a term of years; to the *other*, on an agreement "to hold for *a twelvemonth certain*, and then to purchase the lease." This twelvemonth expired last Midsummer day. The day previous, he was requested to state his intentions; and he offered a sum of money, payable in bills, which were declined. He now refuses to give up possession, and considers himself as tenant from year to year, and entitled to six months' notice in the usual way. He has, however, been served with notice to quit forthwith, or pay double value. The rent up to the last quarter day is unpaid for the whole premises.

1st. Has the tenant a right to consider himself as tenant from year to year? and is he entitled to notice accordingly? and,

* See also, *Heber* (an attorney) v. *Bishop*, Barnes, 169., and *Olmius* v. *Delany*, 2 Strange, 1216., where the Court held that a plaintiff might discontinue a former action on bailable process, although he had proceeded bailably in the second.

2dly. If he has no such right, will he have any remedy over against the lessee and against the under-lessee, if the lessor distrain upon him for the whole amount of rent due for the house?

F. G.

Has the case of *Cooper* v. *Barton*, 3 Camp. 5., been ever countenanced or over-ruled by any Court? and if so, in what Report is it to be found?

STAMP.

A. B. purchases an estate of *C. D.* and *E.* his wife, for an annuity of 30*l.* to *C. D. et ux.* during their joint lives, and an annuity of 20*l.* to the survivor for his or her life. *C. D. et ux.* accordingly execute a conveyance to *A. B.*, reciting that the annuities are to be secured by a bond bearing even date with the conveyance; and a declaration is inserted that the grantors shall have no lien on the estate for the annuities, but shall rely on the bond. *A. B.* executes the bond, reciting the conveyance.

1st. Is an *ad valorem* duty payable on the conveyance? and, if so, how is it computed? The *ad valorem* duty imposed by the Stamp Act on conveyances upon sale seems to extend only to cases where the purchase money consists of a *gross* sum.

2dly. What amount of duty is payable on the bond? and to what class does it belong?

H. H.

APPORTIONMENT OF RENT.

Is not the decision in the case of *Brown* v. *Candler*, reported *antè*, page 106., directly in opposition to the statute 11 Geo. 2. c. 19., which enacts, that where a tenant for life dies before the day on which any rent was reserved upon any demise of lands, &c. which determined on his death, his executors shall recover from the under-tenant a proportionate part of such rent according to the time the tenant for life lived, of the last year or quarter of a year, or other time in which the said rent was growing due?

H. H.

MISCELLANEA.

STATE OF THE LAW IN 1595 IN SCOTLAND.

Captain James Stewart (some time Earl of Arran), was one of James's earliest minions; and neither he nor any other prince ever settled his affections on a worse. Having ventured to stir from the solitude in which he had spent some years of retirement, after being banished from court, this Stewart ventured in 1595 to appear in public, and pass near the castle of Douglas of Torthorald. That haughty baron was made acquainted with a freedom which he esteemed to be done in bravado; as the disgraced favourite was at feud with all of the name of Douglas, for having been the principal agent in pressing forward the trial and execution of the Regent Morton. Torthorald, therefore, incensed at his enemy's audacity, threw himself hastily on horseback as soon as he knew of his journey, pursued Stewart up a wild pass called the Gate Hack, ran a lance through his body, and left him dead on the highway. The friends of the deceased endeavoured to bring the homicide to justice. But Douglas, not caring to undergo the risk of a trial, rather chose to submit to the decree of outlawry, which followed on the occasion. Meanwhile he resided at his castle near Dumfries, with the certainty of making his part good against any one who should approach him with the purpose of giving him disturbance. Things remained in this state till 1598, when the Earl of Angus, lord warden of the whole marches, and having full power of king's lieutenant over the entire frontier, had occasion to command a general assembly of all the gentlemen within his territory for some branch of public service. On such meetings all the landholders in the district were bound to attend under high penalties; and the Baron of Torthorald failed not to obey the summons; the rather that it was sent forth by the Earl of Angus, the head of the house of Douglas. Nor had the earl, acting in his high office, the least hesitation in accepting the military services and aid of a person accused of the murder of the king's ancient minister and near cousin, who was denounced rebel, and under sentence of outlawry for his refusal to abide trial for this crime. But this is only one shade of an extraordinary picture To complete it we must add, that the appearance of Torthorald at the host officially assembled by the Earl of Angus, and it may be supposed the predominance of the Douglas interest, determined many gentlemen in Ayrshire,—Cunninghames, Kennedys, and others connected by blood or friendship with that Stewart for whose slaughter Torthorald was under outlawry—to absent themselves from the host assembled by the king's lieutenant; rather choosing to incur the penalties which might attach to their absence, than risk the quarrels and bloodshed likely to spring from their meeting with Torthorald, where both parties were in arms. The remission granted by the king on this occasion affords a most striking proof his helpless state as a sovereign. The end of the affair was, that a nephew of the slain, Captain Stewart, avenged the deadly feud by running Torthorald through the body some time after, as he was walking in the streets of Edinburgh. But, in truth, the wonder is, how a system, subject to such severe concussions in every part contrived nevertheless to hold itself together. The whole nation would seem to have spent their time, as one malefactor expressed it, "in drinking deep, and taking deadly revenge for slight offences."

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"Quod magis ad nos
Pertinet, et nescire malum est, agitamus."
HORAT.

NOTES ON THE EARLIER CONSTITUTIONAL HISTORY OF ENGLAND.

BY A BARRISTER.

[We continue this paper*, not only on account of the valuable matter which it contains, acceptable to our readers, we trust, at all times; but because in the present movement in every branch of our legislative system, it bears importantly on many of the questions before the public.]

THE SAXONS. (CONTINUED.)

THE nobility still retained their power; and whilst the king banished this noble, and beheaded that, he was really strengthening another, by allowing him no rivals. This was Earl Godwin, who occupied the place that Alfric and Edric had done in the former reigns. Canute was succeeded by his two sons, Harold and Hardicanute, who reigned only seven years between them; and the Saxon line was restored in the person of Edward the Confessor (1041), the son of Ethelred by his second marriage. The power of the nobility, or rather of a noble, in this reign, attained its height. Godwin rebelled with impunity; and his son, Harold, in the life of his monarch, with lineal descendants of a near branch of the crown alive, and in spite of the pretensions of a powerful prince, openly pretended to the crown, and on Edward's death quietly mounted the throne. Edward seems to have been extremely amiable, although weak: the worst part of his character was his immense superstition. Harold's only fault was ambition: he was brave, generous, humane, just, and prudent; and had certainly as fair a claim to the crown as his successor, William the Norman.

* See the former part, p. 259. *ante*.

WILLIAM I. 1606.

One great constitutional point in this reign is, whether William should be called the Conqueror in the usual sense of the word, or in the feudal sense, which merely signifies an acquest, without specifying the means used to obtain it. On looking at the principal authorities on both sides, I am inclined to think with Hale and Blackstone that William did not conquer England as Claudius or Agricola did Britain. William had always considered the English crown his own: on the death of Edward the Confessor he had been favoured by that king, and on the usurpation of Harold came over to claim his kingdom. He brought an army; he stood the battle of Hastings; (having previously offered single combat to Harold, which showed against whom he fought;) he slew Harold* in that battle; and there his hostility ended, after a slight chastisement of his particular enemies. He proceeded to London; he was crowned amidst the acclamations of the people; the friends and relations of Harold every where submitted. Is this the manner that Englishmen receive "conquerors?" At the head of the few laws we have of William, he is expressly styled "the relation of Edward."† He allowed the laws of that king to continue in force; he protected the real heir to the throne, although he had many opportunities of effecting his death, for which he would have incurred but little blame; he frequently pardoned his most inveterate enemies, restoring and augmenting their estates: and were these the acts of a conqueror? The war was taken up against Harold, and ended with him.

That the arrival of the Normans was disadvantageous; that the feudal system, which was then introduced, or soon after,

* This has lately been doubted.

† *Vide* Wilkin's Anglo-Saxon Laws.

enslaved England; that Englishmen fell into disrepute; no one denies: but what has this to do with the conquest? These were the defects of the system, (a system which the English had agreed to,) not of its introducer. That the English did not wish Edgar Atheling to be king, was shown by their ready admission of Harold, and their as ready admission of William. After the death of the first they had no king, and were glad to yield to so glorious a potentate as the Duke of Normandy. Mr. Ritson *, who advocates the other side of the question, appeals with his usual confidence to the later historians, and brings forward the words of Leonine, "Gulielmus rex Anglorum, *bello conquestor eorum*." Now, that William did conquer the Harold party at Hastings, and in all the petty rebellions which sprang up against him, no one doubts; but if vanquishing an usurper, and quelling an insurrection, entitle a man to the title of "Conqueror" why are not Edward I., and Henry IV., and Henry VII., and almost all our kings, more or less, called "conquerors?" they have conquered usurpers and quelled insurrections. The rebellions were not made to support the rightful heir, but for private purposes: it seems almost certain that Edwin and Morcar had designs on the crown, and they quarrelled with William as interfering with those designs (*vide* Carte). In accordance, therefore, with Spelman and Selden, Sir William Blackstone and Lord Hale, I consider that the title "Conqueror," as we now use and understand it, does not belong to William Duke of Normandy.

The introduction of the feudal system was a lamentable step for England. The freedom of the subject was destroyed by it; it made every nobleman a tyrant, and all his tenants slaves; it checked all farther progress of civilisation and refinement; the only literature were rituals and commentaries — the only learned men, priests and devotees. But it is useless to attack what no one defends; every body now joins in seeing its faults, and wondering that Europe should have remained so long under its thraldom.

However we may dislike William as Englishmen, and as being the means of entailing so many miseries on our country, we cannot but admire his character. Surrounded by war from his cradle, nursed amongst battles, and struggling for power when a child, his wonderful foresight, his astonishing bravery, his lofty daring, and his conspicuous clemency, place him amongst the first of our kings after Alfred. It seems hardly credible, that a boy, with a dukedom that hardly acknowledged him as its sovereign, should defeat the most powerful men round him. Henry I. of France; Roger of Trisney, the second man of the land; the Earl of Arques, Guy of Burgundy, the Earl of En, and the Earl of Anjou, were successively defeated by him. Hardly had he assured himself that his kingdom was his own, than he attempted a difficult foreign war that had every prospect of ending fatally to him. In this war, as in every other, he was completely victorious. With a happy mixture of severity and mildness, the most formidable insurrections were dissipated by his presence. No man knew better when to time his measures or pursue his conquests. Nor was he deficient in private virtues; chaste, forgiving, clement, and generous, there were few royal virtues which he did not possess: even his vices, haughtiness and pride, are perhaps the ones we would choose for a king. Avarice has been generally imputed to William, but it appears to me with little foundation. His revenue was undoubtedly large, but he was liberal of it; indeed, he seemed very fond of parade and show, and he was seldom crowned less than four times a year. He might be willing to increase his possessions; but it was rather to grant them with greater plausibility to his favourite Normans, than to retain them for the aggrandisement of his own coffers. He was also arbitrary and severe; but these two qualities were the necessary consequences of the notions in which he had been educated. On the whole, no English king has been braver, more enterprising, or of more refined policy, and few more generally virtuous, than William the Conqueror. [I read Sir John Hayward's life of this monarch, besides the other works before mentioned.]

WILLIAM RUFUS. 1087.

In this reign the state of the country seems to have been little changed from that in which it existed in the last. The English were used more tyrannically, from their having less strength to oppose their oppression. The Normans gradually became all powerful; almost every native family of consequence had been extirpated, and its possessions seized by a great or a petty tyrant. The only rebellions were those fomented by rebellious Norman barons; the only wars were against Normans or Scotchmen. Englishmen dared not even to complain. Never was nation in a more miserable state. The monarch, with no check on his cruelties, rapacity, and treachery; the nobles, with the same vices

* Met. Rom. vol. i. p. lxix.

and the same licence as their monarch; the priests, wicked and hypocritical, filling the kingdom with quarrels and confusion; the people abused by all and relieved by none. The nobility seems to have had power; but either from fear of the brutal William, or from the want of a fit leader, they did not employ themselves successfully.

The character of Rufus can only excite our abhorrence. Whether it arises from the partial accounts of his monkish historians, who hated him; or whether it is that he was really what his actions make him appear; no writer has stepped forward as his panegyrist: in the chivalrous age in which he lived, hardly a magnanimous action is recorded of him. His father's virtues were vices in him, for they were carried to excess. *His* bravery was fierceness and brutality; *his* enterprise degenerated into rapaciousness, *his* generosity into profuseness. He was malicious, vain, treacherous, ungrateful, and unkind. The only thing that England can think fortunate in his reign is its shortness; it being only thirteen years. [I added Hayward's Life of William to the other books.]

HENRY I.

This prince was obliged to do something, and promise a great deal more, to keep the throne he had so unjustly obtained. The feudal oppressions were to be removed, the state of the clergy ameliorated, and the ancient Saxon laws were to be restored. Little, however, seems to have been done. Justice was certainly administered with the greatest severity, though certainly not with impartiality. There was a most disproportionate allotment of punishment. The nobles were rarely punished by death, even for rebellion; whilst for coining, and many insignificant crimes, torture and hanging were the usual sentence. The monarch was still all powerful, although he used his power with more moderation. The nobles still tyrannised, and the people were still without redress. The condition of the English was as miserable as ever. They had now no name as a nation; they, however, were much pleased by the restoration of the Saxon line, in the person of Matilda, the first wife of Henry. No good effects, however, seem to have followed this marriage; and it is singular, that the issue of the marriage, William (who was drowned in 1120), expressed his inveterate hatred against his maternal countrymen. They frequently showed their bravery; and although Henry owed his greatest successes to them, although he was assisted to and kept on the throne chiefly by them, yet we hear of no Englishman being advanced in any way.

The character of Henry I. was greater than that of either of his brothers, as he seems to have joined many of their vices and virtues. He had the bravery and generalship of Robert, with the ingratitude and rapacity of William; he joined to these the prudence and good fortune of his father. He was also affectionate to his children, and condescending to his inferiors: the brightest point in his character was his preferring peace, and his not fearing war; the blackest, his treatment of his brother of Normandy. He did, nevertheless, much for England in foreign nations; he vanquished France and braved the pope; his alliance was sought by the greatest prince in Europe, and he held undivided sway over his very large possessions. He was learned himself, without much wish to encourage it in others; but, considering all things, we have much reason to be proud of Henry Beauclerk, as the third King of England after the Conquest. [I read Sir John Hayward's Life of Henry I., with the other works.]

STEPHEN, EARL OF BOULOGNE.*

It seems to have been a regular thing with the first Kings of England to make the most specious promises when they mounted the throne, and as regularly to break them when it was assured to them. The more they had to fear, the greater their injustice, and the less right they had to the crown, the more the people were promised. Thus, when Rufus came to the crown, he promised something, and performed a little, because he knew that he was half a usurper; when Henry came, he promised more, and performed more, because he knew he was a thorough usurper; but when Stephen seized the throne, who had no more right to do so than the King of Scotland, he had to promise every thing, and do a great deal, to give him a hope of retaining that which he had so unjustly acquired. This was a reign of war, and the most destructive war that even England perhaps ever saw. It was the contest of individuals, not the struggle of nations. During the whole of Stephen's reign (19 years), hardly any battle of consequence was fought; there were skirmishings every

* Stephen is generally called Earl of Blois; but this is wrong. His father was Earl of Blois, and then his brother; he was Earl of Boulogne in right of his wife. So complete an usurper was he, that the shadow of title by which he claimed the throne really belonged to his elder brother, as Sir Richard Baker notices. Chron. Life of Stephen.

week, and barons' quarrels and plunderings every day, but there was little to encourage martial spirit, or improve the nation in the art of war. There was little change, necessarily, in the constitution: "it is from his reign, however, that we are to date the introduction of the Roman, civil, and canon laws into this realm; and at the same time was imported the doctrine of appeals to the court of Rome, as a branch of the canon laws." *

Little can be said as to the character of Stephen. England can never wish for another like him, though she has had many worse. His greatest virtue was (as Baker says) that no particular vice can be imputed to him. He was enterprising and courageous, but did not know when to time his measures. His manners were gentle and familiar to his lowest inferiors. The only remarkable thing in his reign was his gaining possession of the throne with so much facility, and keeping it for so long a time.

[*To be continued next week.*]

REVIEW.

A Treatise on Powers. By Henry Chance, Esq., of Lincoln's Inn, Barrister-at-Law. In Two Volumes. Vol. I. London: A. Maxwell, and Stevens and Sons. 1831.

It may be thought somewhat premature to notice the first volume of this work before the publication of the second, but it suits our plan to do so, for our limits are too scanty to enable us in a single Number to dispose of the whole of the subject before us; and as the author has disjointed his materials, we shall follow his example.

The scope of the first volume is briefly as follows:— The Nature and Origin of Powers, and their Subsistence with the Fee or an Interest in the same Person; — The Instruments creating them, and their Forms; — Their Construction; — Time of, and Conditions preceding, their Execution; — By whom executed, and the requisite Consents; —The Instruments and Ceremonies of Execution;—To whom made; — and the Estates, Interests, or Provisions that may be introduced into Powers.

The subjects of the second volume are intended to be thus arranged: — The Operation of Appointments; — Instruments operating in Execution of a Power, or passing an Interest; — Of Testamentary Appointments; — Of Assets, the Statute of Elizabeth, the Bankrupt and Insolvent Acts, Treason, &c.; — Jointure and Portion; — Leases; — Sale, Exchange, and Partition; — New Trustees; — Appointments to Relations; — Limitations in Default of Appointment; — Equity; — and of Suspension, Extinguishment, Barring, and Merger.

On entering upon our present task, we had designed to revert frequently during the examination of the present volume to the distinguished work on the same subject of Sir Edward Sugden, and to compare the two works chapter by chapter; but as we proceeded in the labour, it appeared decidedly preferable to leave the student and practitioner to his own judgment. By extracts from the preface of Mr. Chance, and by an analysis of his work, we shall enable the reader to form an opinion as to the necessity of adding this volume to his collection on the laws of Real Property. Certainly, those who intend to prepare themselves, in either branch of the profession, for active practice in relation to this department of the law, will avail themselves of *both* treatises.

The undertaking of the present author is undoubtedly a bold one. Among the subjects which the aspiring candidate for professional honours would choose to select, perhaps there are none so unlikely to afford a successful rivalry as those of "Vendors and Purchasers," and "*the* Book on Powers." Some, indeed, of our modern legal writers have occupied themselves on so many publications, that it can scarcely be expected they should have exhausted their subjects, or reaped the field with such industry that nothing remains to the careful gleaner. But in the instance before us, we should have thought it as likely that new *Commentaries* could be successfully written on the laws of England, as that either of the two celebrated works of Sir Edward Sugden could be, not to say superseded, but in any degree displaced.

However, there is one, and probably only one, circumstance in favour of the successor of the eminent person we have referred to; — Sir E. Sugden has for several years been so incessantly employed, not only in the absorbing practice of the Courts, but in the department of answering cases; and to this we must not forget to add the active and protracted interest which he is accustomed to take in the debates in parliament. When all these occupations are remembered, and when we reflect on the

* Black. Comm. vol. iv. p. 421.

numerous cases which are constantly occurring, and bear in mind that Sir Edward has to sustain the reputation, at present undisputed, of another work, we shall cease to wonder that the author has been tempted to enter on one of the same fields of investigation.

Mr. Chance, with becoming humility, acknowledges that,

"If, when Sir E. Sugden published his Treatise on Powers, an apology was thought necessary on account of the existence, on the same subject, of a prior Essay, which had reached a second edition; much more on the present occasion, after his well known work has extended to a fifth edition, now on the eve of publication, may an apology be considered as called for. In the former case no apology was necessary; the case may now be different. At the same time the author has reason to know that the opinion is not universal, that after Sir Edward Sugden's treatise appeared, no void remained; indeed, perhaps, he may be permitted to add, that although he is alone, and altogether answerable for the execution of the present work, he did not embark on the undertaking upon the strength of his own judgment, either as to the want of another publication on Powers, or as to his capability for the task; it behoves him, however, to bear in mind that upon each of these points, and especially as to the latter, there may have been a great mistake."

The author then proceeds to observe, that

"There were some circumstances particularly discouraging to any one having thoughts of writing upon the subject. Among the other 'pretensions to notice,' which Sir Edward Sugden enumerated in the preface to the first edition of his work, were, that 'it had been his endeavour to exhaust the subject;' an endeavour in which, according to the opinion of a gentleman of great eminence*, he succeeded; 'and that in no instance had he shrunk from the consideration of the difficulties which presented themselves, although, following Bacon's example, he had directed his endeavours rather to open the law upon doubts, than doubts upon the law.' On a subsequent occasion†, after the lapse of several years, during which the learned author had had a very extensive practice, and when his judgment must of course have become much more mature, the treatise was announced to be 'the author's favourite work;' it being subjoined that 'a patient revisal of it had proved to him, that little remained to be added from the materials of which he was originally in possession, and in a very few instances had the text received any alteration.' Since this, two other editions have been published, with the advantages of still more extensive practice, and still more mature judgment; these editions in general varying from the second by the addition only of some new cases, the text, 'in very few instances,' having 'any alteration;' and from the mode in which the fifth edition is announced, it is perhaps to be inferred that no extensive additions or alterations are contemplated."

Mr. Chance ventures on some remarks approaching the critical, on the several prefaces of his celebrated predecessor.

"It might, indeed, seem unreasonable to press the cited expressions of the learned author, and others accompanying them, to their full extent, and to construe them as nullifying the qualification contained in the preface to the first edition, and appearing in all the subsequent editions, — that 'he had, in common with others, to plead as an excuse for any inaccuracies in so long a work, that it was written in moments snatched from the labours of his profession, with few opportunities of taking a continued and connected view of the subject;' and this might seem still more unreasonable as to the remarks contained in the advertisement to the second edition, since that advertisement does not appear in the later editions; but still it was out of the question, that any one having in contemplation the possibility of writing upon the same subject, should, in considering the prospects before him, altogether discard these expressions from his mind, — to say nothing of the 'high sanction' supposed to be given to the work by the permission granted by the very learned person to whom the later editions are dedicated, to have his Lordship's name affixed to it.

"Under these circumstances," says Mr. Chance, "which, in the main, operated when the present undertaking was suggested, and considering the estimation in which Sir E. Sugden's work was generally held, and the reputation and fame of its author, there seemed sufficient almost to deter any one from the attempt to enter into a field from which, apparently, so little was to be gleaned; and in truth, the author considers it to the last degree improbable that the matter would have ever entered into his own imagination. And now that he has completed his task, it is natural that some misgivings should enter into his mind, — that he should have apprehension, if on no other points, still that he would subject himself to the charge of prolixity in the statement of the cases so justly imputed to Mr. Powell*, or of the introduction of extraneous matter. However, upon the best consideration which the author acting upon his own responsibility can give to the subject, he thinks he may be considered as justified in intruding his work upon the profession; and, further, that any curtailment of moment would lessen its practical utility."

It seems, that by way of contrast to Sir E. Sugden, our author humbly states that

"He does not profess to have exhausted the subject. That he has taken some pains, considerable pains, with the work, he is free to confess; less could not have been expected — had he done less, he would have been wanting in respect to Sir E. Sugden, to the profession

* Butler's Note (VIII. 2.) to Co. Litt. 271 b.

† Advertisement to second edition.

* Preface to Sir E. Sugden's work.

at large, and to himself; but, doubtless, besides containing many errors, the work must still leave numerous points to be illustrated. Some of the errors and imperfections, further consideration and attention might have enabled him to avoid; others must have eluded him. The kind warnings of his friends, and his own reflections, have alike induced him to stop: with the brief space and limited capacities allotted to us, it is better to succeed moderately, than, aiming at unattainable perfection, altogether to fail.

"The author concludes by apprising the reader that he is not to expect in the course of this work to be made acquainted with new cases not in print, or to have the reported cases elucidated by references to the Register Book, &c. Of manuscript authorities the author has none, nor has he made it his business to seek for any; he has found abundance, and too great an abundance, of materials arising from sources already open to every one; and as to searches in the Register Book, &c., so many cases unfortunately require explanation, that had he embarked on such searches he knows not where he should have stopped.

It was scarcely, perhaps, to be expected, that, admitting a new work on Powers to be wanted, the author of that new work should not frequently come into collision with Sir E. Sugden; this has been the author's lot on various occasions. He has discussed that learned person's opinions with freedom; but, he trusts, with a freedom not unbecoming himself, or the distinguished rank which Sir E. Sugden holds in the profession. If no other motive would have operated on the author's mind, he cannot but have felt that any improper remarks would only recoil upon himself. He is satisfied that the learned author himself, instead of feeling offended at the adoption of such a course, must in a liberal spirit be gratified in seeing his own example followed, at least to a certain extent; for few writers have indulged more freely than Sir E. Sugden in comments upon the opinions of others."

Amongst the differences between the two works, it appears that Mr. Chance has excluded the discussions which he considers not to relate particularly to Powers, namely, *Scintilla Juris*, Devise or Uses, Election, Lunacy, &c. Perpetuity, &c. &c. These are all noticed in the work of Sir Edward Sugden. On the other hand, the present author informs us, that in turning over his manuscript, he found it to occupy about twice the space of the text of the third edition of Sir E. Sugden's book.

The part of the work regarding which Mr. Chance candidly owns he entertained the most doubts was, that of *illusory appointments*. These doubts were of course occasioned by Sir Edward Sugden's recent act, 11 Geo. 4. and 1 Wm. 4. c. 46.; but as the discussion was connected with other parts of the work, he determined to retain it. The chapter on that subject would have been more complete had the alterations effected by the statute been pointed out in the sections to which it relates. In the concluding paragraph the author "refers to the recent act passed with a view of obviating the difficulties *at least in certain cases*." Now, in which of the cases the difficulty has been removed, and in which of them it still remains ought surely to have been stated. Had all the difficulties been at an end, this general reference to the act might have been sufficient; but then it is evident that this part of the subject should have been noticed with the utmost brevity, and rather by way of historical remark on the past than a consideration of the present state of the law.

We shall now present an analysis of the first volume, and reserve our further remarks until the completion of the work.

Chapter I. comprises, 1. The Nature and Origin of Powers. At Common Law and by Custom. In Equity or by Force of the Statute of Uses, and by other Statutes. Whether Powers are ever in themselves viewed in the Light of Remainders. 2. The different Kinds of Powers. 3. How far a Power can subsist with the Fee of an Interest in the same Individual.

Chapter II.—1. Covenants to stand seised. 2. Bargains and Sales. 3. Copyhold Assurances.

Chapter III.—1. Informal Expressions, including the word "Assigns." 2. Points relating to the Statute of Uses. Where the Grantee may take at Common Law. Devises to Uses. Technical Matters relating to the Statute of Uses. 3. What is a Power, and what an Interest. Gifts "to the Discretion," or, "at the Disposal," of a Person; or, "as a Person shall appoint," &c., and to a Person with a Clause of Disposition superadded. Effect of an express Limitation of a Life or partial Interest. Special Cases, *Daniel* v. *Ubley*, &c. Devises to, or Authorities vested in, Executors. Devise or Direction that Executors "shall" sell Land, and that Land "shall be" sold. Devise of Land "to" Executors to sell, and "to be sold by" Executors. 4. As to a Power being vested in Executors by Implication. Where the Moneys are to be applied in the Payment of Debts, &c., and of proper Legacies. Where not to be so applied. 5. Whether a Provision create a simple and proper Power, or include in it a Trust or Gift. Cases of express Trust; and where the word "Desire," or other words of the like import occur; and herein *Harding* v. *Glyn*. Where Property is given or limited "to be" disposed of, &c.; and herein the *Duke of Marlborough* v. *Lord Godolphin*. Where Property is limited to the Objects as a Party shall appoint, &c.; and herein one branch

of *Brown* v. *Higgs*. Where the word "empower," or some such word is used; and herein as to the other branch of *Brown* v. *Higgs*. 6. What Words in Executory Trusts will create Powers.

CHAPTER IV.—1. As to the Creation of Powers of Revocation. Whether a Power of Revocation in an original Conveyance includes a Power to limit new Uses. 2. Of the Law of Perpetuity, as to the Creation of Powers. Power to reduce an unborn Tenant in Tail to a Tenant for Life. Common Powers of Sale in a Will, of Sale and Exchange, and of Leasing. 3. As to the Revocation of Wills by reason of the Creation of Powers. Where a Partition has been effected. Under Conveyances to pay Debts, and to Uses to Bar Dower, in pursuance of a Contract to Purchase. The Doctrine in *Doe* v. *Dilnot*, &c.

CHAPTER V.—1. Construction of Powers. General Subject. 2. As to confining Powers apparently general, and special Cases of Construction. Unlimited Powers of charging. Special Cases of Construction.

CHAPTER VI.—1. Of the Time when Powers may be executed. Powers of Sale, &c. over Remainders or Reversions. Powers to be exercised on contingent Events; and herein as to *Holt* v. *Burleigh*; and as to Powers to be executed by the Survivor of several Persons. And by Parties when in Possession. Miscellaneous Cases involving the question, whether Powers as to their Execution are confined to particular Periods. The Cases arising on repeated Execution of Powers. 2. As to Conditions precedent to the Execution of Powers. Powers of Sale to arise on a Deficiency of the personal Estate to pay Debts, &c. Powers or Provisions of Revocation on the Substitution of other Estates.

CHAPTER VII.—1. Of the legal Capacity of Persons to execute Powers. *Femes Covert:* Powers limited to a Feme covert as an Executrix, or of the nature of legal Trusts. Powers authorising a Feme covert to appoint to Children, &c., and to sell, exchange, and lease. General Powers over real and personal Estates. Powers confined to the Period of Discoverture, or a particular Marriage. Whether a Feme covert can, by the exercise of a Power, divest the marital Rights of her Husband. Transactions between Husband and Wife. Whether real Estate limited to the separate Use of a Feme covert can be appointed by her. Powers of real Estate raised by mere Agreement. *Infants:* As to dry naked Powers. Powers to Jointure. General Powers; and herein *Hearle* v. *Greenbank*. Cases arising under Customs. Lunatics, Idiots, &c. 2. Concurrence of all the Donees, &c. Renunciation by an Executor of his Office. Disclaimer of a Power. Survivorship of Powers; and herein *Townsend* v. *Wilson*. Representatives of a Person executing a Power; and herein *Mansell* v. *Mansell*. Delegation of Powers.

CHAPTER VIII.—1. When a Consent is required. 2. The Period of Consent. 3. How testified. 4. Whether Parties can be compelled to consent, &c.

CHAPTER IX.—1. By what Instruments Powers may be executed. The Meaning of a Power to appoint "by Deed," and "by Writing," &c. What Words do or do not confine the Execution of a Power to a Testamentary Instrument. Of the several Modes of Execution by Acts; *inter vivos*. Feoffment. Lease and Release; and herein *Tomlinson* v. *Dighton*. Covenants to stand seised. Fines; and herein the *Earl of Leicester*'s case and *Herring* v. *Brown*; and, in connection, the question of one Assurance in *Hawkins* v. *Kemp*. Operation of Informal Instruments. Copyholds. Whether an Act, apparently Testamentary, can, in any case, be viewed as an Act *inter vivos*. Of Execution by Will; and herein *Lord Ormonde*'s case, and *Lord Audley*'s case. Revoking of old Uses, and the Limitation of new Uses, by the same Instrument. 2. Ceremonies accompanying Appointment. Appointments, and the Effect of the Statute of Frauds. Ceremonies required being observed. Whether particular Ceremonies apply to two Branches of a Sentence, as *Ross* v. *Ewer*, &c.; including *Fitzgerald* v. *Lord Fauconberg*. General observations on Deeds, &c.; and on Wills, including the question as to the Necessity of a Compliance with the Statute of Frauds. As to Freehold, Copyhold, and Personal Estates. Signature. Sealing and Delivery. Witnesses. Attestation; including the question, what is a Publication of a Will? Inrolment. When the Ceremonies must be perfected. Tenders.

CHAPTER X.—1. To whom Appointments may be made under Powers to appoint to "Children;" and herein as to Settlements upon others made with the Consent of the Objects of the Power; and under Powers to appoint to "Issue," "Heirs of the Body," &c. including the question whether the Issue may take by way of Substitution for their Parents; and under Powers to appoint to younger Children, &c. Whether the Husband may be an Appointee in lieu of the Wife. Whether Appointments may be made by Trustees. 2. Whether any of the Objects of a particular Power can be excluded. What Words require that each Object shall take a Share. What Words authorise an exclusive Appointment. As to the Word "such," or like Words used in different Connections. As to the Force of particular Expressions, apparently intended to guide the Donee in the Exercise of his Discretion. Where an Appointment to a single Object, rather than a Division, seems to be contemplated, and where there are two Classes of Funds. 3. As to an Appointment to, or the Exclusion of, the Representatives of an Object. 4. As to Illusory Appointments. The Authorities at Law, and the principle upon which Equity interferes. The Cases in Equity, down to modern Times. Cases before Lord Rosslyn,

Lord Alvanley, Lord Redesdale, Sir William Grant, and Lord Eldon. As to what is a substantial Share, &c. What Circumstances are or are not sufficient to justify the Appointment of an unsubstantial Share. Conduct. A Provision; and herein what is a Provision; and as to a total Exclusion when the Object is provided for, or on other Accounts. Special Circumstances. Particular Cases, and the recent Act of Parliament.

CHAPTER XI.—1. The general Subject on Powers of Ownership. Whether the Fee or absolute Interest can be limited. Whether partial Interests can be created; and herein as to the Law of Perpetuity, &c. Effect of a general Power to charge. 2. As to the general Subject on limited Powers. Whether a Fee or an absolute Interest can be limited; and herein *Wykham* v. *Wykham*. Whether partial Interests can be created. Estates Tail; and herein *Doe* v. *Denny*. Life Interests. Rents, Charge, Portions, &c. herein *Kenworthy* v. *Bate*, and *Long* v. *Long*. As to the Shares to be appointed; and herein whether Shares in Severalty or in Common, can be limited; or in Estates in Joint Tenancy, and as to the Variation of the Shares. The Ages or Times at which the Objects can take. Conditions, including Clauses of Survivorship, &c. Limitations to the separate Use of a married Woman. Cases where the Interests are fixed, there being but a mere Right to nominate or apportion. 3. Of the Reservation or Limitation in Appointments of Powers of Revocation, and of new Appointment. Whether an Appointment is revocable. Reservation or Limitation of Powers of Revocation, and of new Appointment on the Exercise of general and limited Powers. Reservation or Limitation of Powers of Revocation, and of new Appointment, *toties quoties*. Reservation of Powers of Revocation, and of new Appointment, once for all prospectively. Whether a simple Power of Revocation in an Appointment includes a Power to limit new Uses.

PRACTICAL POINTS OF GENERAL INTEREST, No. VI.

WHEN BANKERS WILL NOT BE LIABLE FOR FORGERY.

A TRADESMAN left with his wife certain blank checks, signed by himself, directing her in his absence to have them filled up for such sums as the purposes of his business might require. The wife requiring 50*l*. 2*s*. 3*d*., desired one of her husband's clerks to fill up one of the checks for that sum. The clerk did so, and was sent to get cash for it; but before he presented the check, he altered it by inserting "Three hundred and" before "fifty," having previously left room for the interpolation, and obtained the additional sum, and absconded. Held, that the bankers not being chargeable with any negligence, were not liable to make good the loss.

Lord Chief Justice *Best*. This being a question of very considerable importance, was properly raised by the arbitrator. It is quite clear that if a banker pays a forged draft, he must bear the loss, on the ground that a payment so made is made without the authority of his customer. It is upon this principle that the cases of *Smith* v. *Mercer*, 6 Taunt. 76., and *Hall* v. *Fuller*, 5 B. & C. 750., were decided. The bankers, in the former of these cases, were undoubtedly in fault, as they ought to have better satisfied themselves of the handwriting of their customer. If a banker pays that which purports to be the draft of a customer, without using due diligence to ascertain his authority, he is the party that alone ought to suffer. That is a principle clearly established; but it is equally clear, that if a banker, through the fault of the customer, pays more than he ought to pay, the loss must be borne by him through whose fault the erroneous payment was made. This is well put by Pothier, commenting on a case by Scacchia;—Cependant, si c'était par la faute du tireur que le banquier eut été induit en erreur, le tireur n'ayant pas eu le soin d'écrire sa lettre de manière à prévenir les falsifications; puta, s'il avait écrit en chiffres la somme tirée par la lettre, et qu'on eut ajouté zero, le tireur serait en ce cas tenu d'indemniser le banquier de ce qu'il a souffert de la falsification de la lettre à laquelle le tireur par sa faute a donné lieu: et c'est à ce cas qu'on doit restreindre la décision de Scacchia." Now let us apply that principle to the present case. It was entirely through the fault of Young, that Messrs. Grote and Co. paid the sum of 350*l*. instead of 50*l*. He had left five blank checks in the hands of his wife. She was therefore his agent. If a tradesman must necessarily leave blank checks to be filled up in his absence, he should intrust them to some person who is conversant with business, and who will take care that they are not misapplied. Mrs. Young clearly acted indiscreetly in intrusting the check in question to a person with whose character she was not perfectly acquainted, and who turned out not to be trustworthy. If Young, instead of leaving the checks with his wife, had left them in the hands of some person better acquainted with business, he would

hade been able to guard against such a fraud. The word "fifty," it appears, was commenced in the middle of the line instead of at the beginning, and commenced with a small instead of a capital letter, space being left for the fraudulent insertion of the words, "Three hundred and"; in like manner, at the bottom of the check, space was left between the £ and the figures 50 for the insertion of a 3. Too much opportunity was thus given to the clerk to effect the alteration of the check. The whole being in the same handwriting, it was not possible for the bankers to discover that there was any fraud. Under the circumstances I think that gross negligence may be imputed to Young and his agent, and that the bankers, who had been misled by his want of caution, and thus induced to pay the money, are not liable to be called upon to make good the loss. I am therefore of opinion that the rule which has been obtained on the part of Mr. Young, calling upon Messrs. Grote and Co. to pay him the difference between the amount of the check as originally filled up, and that for which it purported to be drawn when presented at the banking house, ought to be discharged.

Mr. Justice *Park*. I am of the same opinion. The case of *Hall* v. *Fuller* is essentially different from the present, as in fact the draft was there altogether a forgery. If a banker pays a forged draft, he must take the consequences. The judgment of Lord Chief Justice *Abbott* in *Hall* v. *Fuller* is certainly very general in its expressions, but it must be taken with reference to the particular facts of that case. Mr. Justice *Bayley*, however, put the case on the same principle on which we now decide this. He says—"The banker, as the depositary of the customer's money, is bound to pay, from time to time, such sums as the latter may order. If unfortunately he pays money belonging to the customer, upon an order which is not genuine, he must suffer." Here the order appeared on the face of it to be genuine. The maker left it with his wife, to be filled up at her pleasure, and to any amount. It was therefore his draft to the extent of the property at his banker's. The arbitrator has found Young guilty of gross negligence. I think Young was guilty of gross negligence, in leaving blank checks in the hands of a person so ignorant of business as to give rise to such a gross fraud.

Mr. Justice *Burrough*. The arbitrator has expressly found, that no blame whatever attached to the bankers; the whole blame legally attaches to the plaintiff, who improvidently left the blank checks in the hands of the wife, to be filled up as required. She saw the check in question filled up in an unusual manner, both as to the figures and in the body; and she gave it in that state to her husband's clerk to get changed, thus affording him an opportunity to effect the contemplated fraud. The drawer of the check, being the sole cause of the fraud, must bear the loss.

Mr. Justice *Gaselee*. I am of the same opinion. The arbitrator has not found that the clerk was in the habit of filling up checks for his employer, or of going to the bankers to receive drafts. Those facts might have strengthened the case. But he has expressly found that the drawer was guilty of gross negligence. The authority was confined to the wife; as it appears that she was to have the checks filled up as circumstances required.—*Young* v. *Grote and others*, 12 Moo. 484.

THE LAW REFORMER.

USURY LAWS.

To the Editor of the Legal Observer.

SIR,

In a recent Number of your Journal, p. 182., a spirited attack was commenced on the Usury Laws. Your correspondent has stated his objections in a forcible manner, and brought forward those which are the most popular and striking; but although his views are deserving of serious attention, I think he has failed in making out a case which would justify the legislature in any sweeping measure of repeal.

I trust you will afford room for the following defence of the principle of the usury laws, which I prepared some time ago, and which, after a careful revision, and after weighing all that has been since urged on this subject, I can perceive no reason to alter.

I am, Sir,
Your faithful servant,
B. B.

The foundation of the law against usury, like that of every other law, depends, of course, either on the good it produces or the evil it prevents. The object of all legislation is to benefit the community at large, and to restrain whatever is injurious to it. Industry is beneficial, and idleness injurious. Productive labour is the great source of national wealth. It is the policy of these laws, therefore, to *prevent the idle from reaping too large a portion of the fruits of industry*. A large profit should not be permitted without some adequate portion of labour.

A moderate rate of interest ought certainly to be allowed, not only because we cannot ex-

pect money will be lent to a stranger without some return, but because it is in the majority of instances just and proper. The money has been acquired by industry. The loan enables the borrower to acquire a profit. It is therefore reasonable that the lender should receive a remuneration during the time he parts from it.

A fixed rate of interest secures property from fluctuation and uncertainty in value. Without this, no one could depend on any prospective calculations or future provision, either for himself, his family, or connections. All contracts, to be executed at a distant time, would be entirely speculative. There would be no common standard by which to estimate the value of any future property, contingent or reversionary. There would be at least the same instability that there now is in the price of the government stocks; and, in all probability, the fluctuation would be still greater; because, in private transactions, each individual would be guided by his own opinion, and be influenced by his own interest; and, though there might be, in large transactions, and amongst the principal bankers and merchants, something like a market price for money, yet every lender would still be able to treat the cases that came before him, as differing from the general rule, and forming the exceptions.

Borrowing, in general, is decidedly an evil. There are, indeed, cases of exception. There are some occasions in which the rule should be relaxed; but in the majority of instances, borrowing should be checked, and the laws which check it are useful and necessary. That "borrowing dulls the edge of husbandry," is an obvious truism. He who can borrow with ease will not husband his resources; and, in proportion to the facility of borrowing, will be the diminution of cautious savings and industrious exertions. The journeyman and the young tradesman, instead of frugality and labour, by which alone, at present, he can advance himself, are, according to the new system, to depend on the favours of money-lenders; and, instead of commencing or proceeding in their career with a small capital unincumbered, and on the credit gained by good conduct, they are invited to start with a millstone of usury around their neck. A speedy race they will make of it!

It is not wise to tempt persons to lend money on insecure contracts. The permission to receive heavy interest will not secure the principal. It is injurious to both parties,—inviting the one to speculate with property not his own, and the other to calculate on gains which he has never earned, and frequently never receives.

This facility to borrow diminishes prudence. This valuable habit is never very eminent amongst mankind, even under every inducement; and it would be still farther impaired, and brought beneath its lowest standard, by increasing the opportunities to borrow. Those laws, which favour frugality and industry, favour also national *morality*, for they who are employed in useful labour, are not only the most important members of society, by increasing its wealth, but they are also the most moral.

It seems to be assumed, that, as the facilities to borrow, and the temptations to lend, will encourage speculation and increase trade, so the community must necessarily be benefited. But the *quantity* of trade is not the criterion of permanent advantage, or of durable wealth. One cannot, indeed, but suspect, that there is some mistake in supposing that we shall derive advantage in proportion as one class of society encounters risk, and the other runs in debt!

If the usury laws are abolished, the means of procuring money, it is maintained, will be increased. One of the advocates for the repeal has stated the point a little strangely: "Take away the usury laws, and then every one may become a borrower." Indeed! We are then to be a nation of lenders and borrowers, and farewell to that thrifty independence which has been the boast of the British farmer and the British tradesmen.

The fairy prospect held out to the view of the commercial world, is, that capital may be borrowed to increase the trading community; and that we shall consequently have more tradesmen and more merchants. An admirable project! Need any one be reminded that, in all branches of trade and manufacture, the number of persons embarked is already sufficient? Admit the prospect to be realised, the number of the masters will be increased, and that of the workmen diminished. Will that be an advantage? No; the result plainly will be, that, from the increased competition, the profits must be diminished; and out of these profits is to be paid the enormous interest, which the lender will necessarily exact to guard him against the very probable loss of his principal.

"It is not every apparent benefit that is a real one. The advocates of unlimited freedom in money transactions, like the advocates of some other species of freedom, might, perhaps, if their demands were allowed, obtain more than they either expected or desired. All individual, as well as all general good, must be duly moderated. Every thing has its boundary. There is nothing on earth illimitable. Commerce, however advantageous, may be too extensive. There may be too many merchants and traders, and there may be more merchandise than necessary. Admitting the assumption, that more articles would be manufactured, and more adventurers come forward, it is no necessary consequence that the country in general would be benefited. General plenty and cheapness are peculiarly desirable; but the abundance which may add to the comforts of one class may, in the same proportion, diminish those of another; as cheapness in London may produce poverty at Manchester.

It is not at all surprising that some eminent mercantile men should favour unlimited usance. Their extensive credit and influence enables them at all times to obtain money at a moderate rate. *They* need not fear extortion. They have abundance of good security to offer the lender. But the evil will fall on the small trader, and those who have not the first-rate security to deposit. Thus, it will naturally happen, that they who can least afford to pay a high rate of interest, will be obliged to pay it. It is true that some of their profits are larger, in comparison, than those of the great merchant; but then they have to bear all the numerous

expenses incident to business, out of a limited return.*

There are sufficient reasons why there should be a distinction in the law between the dealing in money and in other species of property. They are essentially different in nature and intrinsic value. Money is not like any other commodity. Metal in the shape of *money is of no intrinsic value.* Its importance, necessity, or use, is merely relative and conventional. It is only a representative of wealth, just as paper money is valuable only as the substitute for coin.

It is imperishable. It occasions no expense to replace it, and scarcely any to preserve it. Houses, and every species of property, diminish in value by use, and require the continued application of industry and capital to preserve and renew them: therefore they are entitled to a higher rate, and, from various circumstances, that rate cannot be precisely fixed. If it could be fixed, and it were the interest of the community to fix it, it would be just to do so.

Security is given for the return of the money, which is not the case in the loan of other property. A less profit therefore should, in justice, be required, because the risk is obviously less. If I borrow a horse, I am to pay the hire of it. The lender has no pledge of other property to secure the return of the horse; but he is protected, so far as he can be protected, by the terror of the criminal code. The owner of a house, also, receives no direct security; but then the hirer is subject to a stricter rule of law than other contractors; for, if he does not pay the rent when due, his property may be immediately seized; and, even if he remove it, it may be followed and taken possession of, and in five days sold: so that the law does, in truth, adapt itself to the necessity or utility of each particular class of cases; and the general practice, as well as the principles, of legislation, therefore, justify the adoption of such measures as may be expedient in pecuniary contracts.

The dealing in money partakes of the evils of monopoly. It is not a production common to mankind. They who hold it, if unrestrained by law, are enabled to dictate terms to those who want it. It is not, like other articles of property, capable, by industry, of increase. *Corn*, for instance, may be purchased or bartered for by any one, and will increase in proportion to the labour and cultivation bestowed. Here we observe the just reward of industry. We need not adopt the reasoning of Aristotle, that, "because money is naturally barren, it is preposterous to make it breed money."* It is enough to show that it differs in nature and utility from every other commodity. But the law does not rest upon this intrinsic difference; it is grounded upon public utility and justice. Though money is in itself incapable of increase, it was produced by industry; but then these investments of surplus should not receive so high a reward as present and actual industry. It does not need it, and it is not wise to afford it.

Another difference between money and all other articles, consists in its being comparatively *immutable* in nature and extent. It is useless to make laws to fix the price of merchandise, because it varies indefinitely, both in quantity and quality. It is not so with respect to money. The aggregate quantity in Europe has not much differed for many ages, and the quality never varies. There is but little risk or speculation in dealing with it; in merchandise there is generally considerable hazard. The principle of encouraging industry also applies in favour of merchandise. Some acts of extortion may be tolerated for the sake of the general benefit; but the impossibility of framing regulations that can be carried into any thing like general effect, in a vast trading community, sufficiently accounts for the absence of restriction on the price of merchandise.

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* The probable effect of a repeal of the law upon the great majority of traders and manufacturers in this country, is well pointed out in the valuable testimony of Mr. Rothschild. He says, "I think the operation of the usury laws, as bearing upon the value of money in England, of great importance to tradesmen. In this country it is different to those on the continent: a bill drawn upon such persons is seldom, if ever, seen; while in this country they abound, and are doubtless a great and necessary accommodation to that part of the community. Small manufacturers, likewise, derive many advantages from this kind of assistance; as many of them have friends or a confidential person in town, on whom they draw at short dates, against their goods sent to the London market. These bills become negotiable at the legal rate of five per cent. discount, which enables such persons to carry on their concern, not only with more facility and advantage, but to a much greater extent. It is impossible for me to say positively what would be the consequence to these, and many others of a similar description, were the usury laws repealed; but I believe great advantages would, in many cases, be taken of the necessities of such persons, by the lender demanding, probably, two or three times the rate of interest from them on this security, as would be required in discounting the bills of first and second-rate houses: therefore, it appears to me, that *the less opulent should be protected in some way from being exposed to so great a reduction in their profits*, through the necessity of turning their capitals, by immediately discounting their drafts at an extravagant rate; those persons not having hitherto had much difficulty in discounting their bills at the legal rate of five per cent. discount."

* This passage, Blackstone observes, has been suspected to be spurious. But there is no improbability in Aristotle's having, in the age in which he lived, entertained such an opinion. Usury was held in public reprobation, and the form in which the objection is couched by Aristotle was, in all probability, the most popular argument against it. The opinion is also quoted in *Puffendorf*, p. 509., without any doubt of its authenticity.

EXPENSE OF COMMISSIONS OF BANKRUPT.

To the Editor of the Legal Observer.

SIR,

No one can object more strongly than I do to the fees that are paid for private seals, and also for public seals, as far as regards commissions of bankrupt; and I hope the day is not far distant when those fees will be altogether abolished. The more immediate business, however, of this letter is to correct a mistake which appears in the letter of your correspondent, *A. B. C.*, in your last Number, p. 245., *antè*. The mistake I allude to, is his statement respecting the fees paid for sealing commissions of bankrupt.

Your readers, and the public at large, are altogether mistaken, if they fancy one farthing of those fees finds its way into the pocket of the Lord Chancellor: they are all paid to a clergyman of the Church of England. The only sum the Chancellor receives for issuing a commission of bankrupt is 2*l.* 2*s.* This is the invariable fee from the 1st of January to the 31st of December. The fees which are paid for sealing, and which ought to be instantly abolished, are enjoyed by the Rev. T. Thurlow, who is styled the patentee of commissions of bankrupt. For every commission that is sealed at a *public seal* this Rev. gentleman receives 4*l.* 16*s.* 2*d.*; and for every commission sealed at a *private seal* 6*l.* 18*s.* 8*d.*; and for these large sums *he does nothing whatever, not even so much as sign his name* to the commissions, for that he takes care to have printed. The office is altogether the most useless that exists in any of the Courts of law or equity, and ought to be the first abolished. The commission ought to be sealed and issued without any expense beyond the 2*l.* 2*s.* paid in the Lord Chancellor's office.

The heavy charges made for journeys to the Chancellor to get commissions sealed when he is absent from London, might be easily put an end to, by an act of parliament authorising a Master in Chancery to issue a commission in the absence of the Lord Chancellor. This would not only prevent great expense, but also great delay; which, in many cases, is by far the greater evil of the two.

Hoping that you will do me the favour to insert this in your next Number, I remain your sincere friend, and one of your earliest subscribers,

D. E. F.

NOTES OF THE WEEK.

PROCEEDINGS IN PARLIAMENT RELATING TO THE LAW.

POOR LAWS' AMENDMENT BILL.

THIS bill has been read a third time in the House of Lords and passed. The objects of the measure are as follow:—By the 59 Geo. 3. c. 12. § 12. overseers had power to take *land on lease* for the *employment of the poor*, to the extent of twenty acres. The bill removes this limitation. By the 22 Geo. 3. c. 35. § 27. overseers had the power of *enclosing waste land* for the employment of the poor, to the extent of ten acres. The bill increases that amount to fifty acres.

COMMISSIONERS OF LUNATICS' BILL.

This bill has also passed the House of Lords. The amendments which it effects are the following:—1. A change in the members of the commission, adding some medical men; 2. Vesting the control in the Lord Chancellor; 3. That it was not to be imperative to take down the names of those who visited the patients. The relations of those confined were not to be bound to visit them; as there might be cases in which, for the sake of the patients, they should not be visited.

FRAUDULENT DEBTORS' BILL.

On Lord Wynford's bill, there appears to have been nearly an equal number for and against it. The Lord Chancellor declared the noncontents had it; but Lord Wynford said the contents had it. The House therefore was cleared for a division, but we understand no division took place, and the bill was lost.

LAW OF REAL PROPERTY.

Mr. *Campbell* has again introduced his bills for the amendment of the law: 1. Of Inheritance; 2. Of Dower; 3. Of the Statute of Limitation; and 4. Of Estates by the Curtesy of England. We shall present our readers with an analysis of these bills in the next and succeeding number.

There are two other bills in preparation, but which, it seems, require further deliberation.

SUPERIOR COURTS.

LORD CHANCELLOR'S COURT.

CONSTRUCTION. — SETTLEMENT. — CHARITY.

If lands are given to trustees upon trust to pay 20l. a year to settlor's sister for life, and after her death to her children equally, and after their death to pay to certain persons 20l. for maintaining four scholars of Westminster, and out of the rents to pay 15l. and 5l. to the poor, the whole property will be applicable to the purposes of the charity.

THIS case arose upon an information filed for an account of the rents of leasehold property, and to have a lease for 500 years given up to be cancelled. Dr. Triplett, by a settlement, in December, 1668, vested in trustees the rectory of Hawleigh, in Norfolk, and the advowson and the manor called Fishponds, and other premises,

upon trust, out of the rents to pay 20*l.* a year to his sister for life, and after her death to her children equally, and after their death to pay to the Dean and Chapter of Westminster the said 20*l.* to maintain four of the most worthy scholars of Westminster at the University, and out of the same rents to pay 15*l.* and 5*l.* to the poor of two several parishes. Two questions were raised. The first, whether the trusts to pay to the testator's sister and for the other purposes was to be taken as a gift of the whole of the property for charitable purposes, or only a gift of 20*l.*, leaving the residue to other purposes. The second question was, whether the advowson was included; the defendant contending that an advowson cannot be given for charitable purposes; and if it be not included, that then it went to the testator's heir at law. Great difficulty existed as to the point whether an advowson can or cannot be given for charitable purposes. His Lordship agreed, that if it could only be made profitable by means of simoniacal dealing, it would not pass; but then that must be shown. He saw that it might be used in two different ways without simony. It might be sold, *toties quoties*, while there was a plenarty as far as the next presentation; and it might be sold out and out at once, and the moneys applied for the purposes of the charity. The authorities, however, pressed his Lordship so much upon this point, that he should abstain from disposing of that part of the question, and he invited the gentlemen of the bar to furnish him with any authorities upon the subject. The opinion he had come to upon the other part of the case was, that there was a gift to the trustees of the whole, not as a resulting trust, or as it would have been if the case had been slightly different, but for charitable purposes. The cases all lay down the rule, that although particular details may be in a deed, and sums specified by the founder, and although no express gift of the residue over, and such sums exceed the amount specified, still if it appear that charity was the object of the donor, and that all the property was to be departed with by him, the Court would either give the whole or frame a new scheme on the doctrine of *cy pres*. The case of *Thetford School*, 8 Co. 130b., was the first on this point, and was strong to show that the presumption is always against the trustees, and in favour of the charity. His Lordship said he was not one who would strain the meaning of words in favour of charities further than their obvious signification, and against the representatives of the families of the founders. Here the words were, that the gift was to no other use than that specified. Was there any beneficial interest intended or expressed to the trustees? Certainly not. Nothing could have surprised Dr. Triplett more than to hear that John Needham, his trustee, should have made a lease, or rather an alienation; for although it purported to be a husbandry lease, it was for a term of 500 years, to his own son-in-law, at the same rent which was payable in 1668, although a great rise had taken place in the value of land. And this was done by Mr. Needham for his own benefit, because he was bound to pay his son-in-law 1200*l.*, which was released in consideration of this lease. A more bare-faced breach of trust was never practised. As against the persons claiming under the trustee it was clearly void; and there was enough in the deed to exclude the heir at law, and to admit the rights of the Crown and of the charities. His Lordship expressed his intention of deciding the point relating to the advowson, and said the appeal must be dismissed, and the decree of the Master of the Rolls affirmed.—*Attorney-General* v. *Ward.* L. C. June 20. 1831.

BOUNDARIES.

This was an appeal from a decision of the Master of the Rolls. The former proceedings in the cause have been reported *ante*, vol. i. 14. Digest, 9. 1 Russ. & Myl. 59.

The *Lord Chancellor* was of opinion that the decree was perfectly right, and must be affirmed. —*Godfrey* v. *Littel.* L. C. June 15. 1831.

APPEAL.

The decision of the Master of the Rolls in *Davies* v. *Thomas*, 1 Tam. 416. Digest, p. 121. was confirmed by the *Lord Chancellor*, and the appeal dismissed with costs.—*Davies* v. *Thomas.* L. C. July 25. 1831.

ROLL'S COURT.

9 GEO. 4. C. 14. — COSTS.

The stat. 9 *Geo.* 4. *c.* 14. (*Lord Tenterden's act*) *will apply to a suit instituted for the recovery of a debt before the passing of the act, but which does not come to a hearing till after.*

In this case the plaintiff was an innkeeper at Bromhill, and had for a considerable period supplied an attorney, named Wormington, with wine, spirits, and post-horses, until the debt so contracted had amounted to upwards of 90*l.* Wormington, the debtor, having died intestate, in the year 1818, letters of administration to his estate, real and personal, were taken out, and a deed of trust was executed for the application of this property, amongst other things, towards the payment of the intestate's debts. The administrators had denied the plaintiff's claim; but as it was proved to have been admitted by the intestate previous to his death, it was a good demand, under a parole acknowledgment, previous to the passing of Lord Tenterden's act, 9 Geo. 4. c. 14. By that act, which is a supplement to the statute of limitations, it is provided that no acknowledgment of a debt would take it out of the operation of the statute, unless the acknowledgment were made in writing. Lord Tenterden's act commenced to run in 1829; this suit, however, was instituted previous to this time; but it not having been brought to a hearing subsequently, the question was, whether it should be subjected to the provisions of that act. It was submitted that, upon the principles of a Court of equity, his Honour would not consider the plaintiff's claim as at all coming within the operation of the act in question.

Mr. *Bickersteth* and Mr. *Stinton* for the plaintiff.

Mr. *Pemberton* and Mr. *Rogers* appeared for the defendants, the administrators of the intestate. The debt had been contracted between 1802 and 1808, and might have been recovered

long before 1818, when the debtor died. There had been such neglect on the part of the present claimant as rendered him, but for the acknowledgment of the intestate, liable to the provisions of the original statute of limitations.

The *Master of the Rolls* said, that as far as regarded the confirmation of the plaintiff's claim, the Court could only follow the rule at law; and as it had been determined that a suit instituted before Lord Tenterden's act had come into operation, but not brought to a hearing till afterwards, was to be considered subject to its provisions, the only question for the Court now to decide was with respect to the costs of the proceedings.

Mr. *Stinton* submitted that the decision would be severe, if not contrary to the principles of that Court, if the costs of proceedings instituted previous to the running of Lord Tenterden's act should be thrown upon the present plaintiff.

His *Honour* said, that as to the costs subsequent to the year 1829, when the act in question came into operation, he should consider them as incurred at the plaintiff's peril: he should therefore dismiss the bill; the plaintiffs paying those costs, and also the costs of those defendants who had been made formal parties to the suit.—*Lockley* v. *Maund*. R. C. June 13. 1831.

ARCHES' COURT.

PRESENTATION.—NEW CHURCH.—INCUMBENT.

When a new church is built, the incumbent of the parish has the right to nomination to it.

Sir *John Nicholl*, in giving judgment in this case, stated the facts of it, which were these:—A Mr. Baker built a church in the parish of Honiton, of which parish the Rev. Mr. Bliss was the incumbent. The church was consecrated by the Bishop of Chichester, and the Rev. Mr. Wood was nominated by Mr. Baker to officiate therein. The right of nomination exercised by Mr. Baker was opposed by the Rev. Mr. Bliss, as contrary to law, and he prohibited Mr. Wood from officiating. On finding his prohibition not attended to, he instituted a suit against the Rev. Mr. Wood for officiating contrary to his orders. Subsequently to the suit, the commissioners for the building of new churches under the act of parliament, declared that Mr. Baker had the right of nomination. There was no criminal accusation in the case; the object was to decide the civil rights of the parties. The question was, whether Mr. Wood was legally authorised to officiate. According to the general law, no chapel could be consecrated without the consent of the incumbent of the parish in which it was built, as well as that of the patron and ordinary. It was necessary to have the consent of the incumbent, as he had the care of the spiritual conduct of his parishioners; and the building of a new church without his consent might introduce schisms, and also affect his emoluments. On these grounds, by the general law, the joint consent of all the three was necessary; and, according to Lord Chancellor Northington and the present Lord Chief Justice Tenterden, the right of nomination was vested in the parson or vicar. It was clear, then, that Mr. Bliss had the right of nomination, unless the general law had been so altered as to give Mr. Baker that right. A general right could not be taken away without direct authority. By the statute 7 & 8 of Geo. 4. c. 72. no new church was to be built, unless where the population exceeded 4000, and the parish church did not afford accommodation for more than one fourth; or where 1000 of the inhabitants were more than four miles distant from the church. Now the population of Honiton was eight hundred, and the church contained six hundred. By the 16th clause of the same act, the consent of the incumbent, as well as the patron, was made necessary to divide a parish; and, by the 18th clause, all new churches were, during the incumbent's life, to be chapels of ease; and, by the 67th, the right of presentation was vested in the incumbent. The same principle ran through the subsequent acts relating to the building of churches. By the act of 5 Geo. 4. the bishop of the diocese was allowed to consent to the building of a new church, on the application of twelve or more householders, showing that there was not sufficient accommodation for one fourth of the inhabitants. In that case the right of nomination was vested in them for two terms of forty years, then to revert to the incumbent. He would now come to the last act of 7 & 8 Geo. 4. on which the defendants rely, and the true intent of which was to be considered. By the 3d section of that act, the commissioners were thereby empowered, when a new church was built, to vest the right of nomination in the person or persons who should endow such church. This was a hasty act. It passed through both Houses of Parliament, and received the wording of it was loose and careless, and it could not be expected to supersede all former acts relating to the same subject. The chief object of this act was to encourage the endowment of churches; but it was not to be supposed, that whosoever would endow a church, of whatsoever persuasion he might be, should have the nomination of the ministers of such church without the consent of the incumbent. The act says, "when a chapel is built," but a chapel cannot be built without the incumbent's consent. If such were the case, a man might say to the commissioners, "Here is a chapel. I will endow it; you must give me the right of nomination." No discretionary power was left to the commissioners in such a case; and though the heirs of the endower might not be of the Church of England, yet the right of nomination would continue to them. The population in the present case is 800, and the parish church can hold 600, so that it does not come under the former act. The learned Judge's impression, therefore, was that the allegation of Mr. Wood did not sufficiently establish his case; and that he had, therefore, officiated without right.—*Bliss* v. *Wood*. Arches' Court, July 1. 1831.

ANSWERS TO QUERIES.

LEGACY. P. 207.

As regards the devise of the freehold and copyhold estates (subject to the custom), in order to render the various limitations consistent with themselves, and that the remainder to *C.* in fee

may not be void as too remote, "ut res magis valeat quam periat," the word *heirs* (unless *B.* be a denisen* or bastard †) in the devise to *B.* must be construed *heirs of the body* ‡: thus the sentence will become, "after the death of the wife to *B.* and the heirs of her body; but in case she should have no heirs of her body, then after the decease of the wife to *C.* in fee." By the restriction of the first limitation in favour of *B.* contemplated under the words, "but in case she should have no heirs of her body, then after the decease of the wife to *C.* in fee;" it might be said, that the testator intended to give *B.* nothing unless she should have issue; but if this be so, in case that *B.* should survive the wife, being, at the time of the wife's death, without issue, she would take nothing, and the permanency of the rents, &c. would be in abeyance until she had issue, or died; for whilst she were alive, the law would contemplate the possibility of her having issue; this, therefore, cannot be supposed to have been the intention of the testator. The only other meaning then is, that the testator intended to restrict his kindness to *B.*, to herself and her children: and taking into consideration the first clause in favour of *B.* jointly with the second manifestly intended to restrain the former, in order that each may have due effect; the restraining clause must be considered as confining *B.*'s estate within narrower bounds than that of a tenancy in tail, and yet to benefit her issue: *B.* must therefore be held to have a life estate only, with remainder in tail to her issue. The devise therefore is, To *B.* an estate for life after death of the testator's wife (widow). To *B.*'s issue an estate tail by executory devise, which would become, on the death of *B.* in life of the wife, a vested estate tail in remainder after wife's death. To *C.* a remainder in fee after the wife's and *B.*'s respective estates for life, and an estate tail to *B.*'s issue. By this construction, *C.*'s estate in remainder in the leasehold is rendered good in the event of *B.*'s dying without issue living at her death §; otherwise it would be too remote, and therefore void. D.

RESIDUE. P. 239.

This appears to me a question of some doubt. It is quite clear that the person who last resided with the deceased can maintain no legal claim to the residue of the 30*l.*; and as *B.* became answerable for the funeral expenses, I consider him to be the person entitled to the residue.

H. B. A.

PRACTICE. P. 255.

1. In answer to your Querist *C.* I beg to say that it is the usual practice among my professional brethren, on an executor requiring a release from legatees under a will on winding up his executorship, that his (the executor's) solicitor should prepare the release, and send it to the legatee's solicitor for his perusal.

In the case of mortgages and purchases, the mortgagor or purchaser's solicitor, after satisfying himself as to the title, prepares the mortgage or purchase deed.

In the case of leases, the landlord's solicitor, and of covenants, the covenantee's solicitor, prepares the draft.

W. H.

Lincoln's Inn.

2. In reply to your correspondent *C.* I beg leave to observe, that is customary, on the winding up of an executorship, and the executor requiring of the legatees a release in full of all claims and demands, for the release to be prepared by the solicitor to the executors.

In cases of mortgage it is likewise customary for the solicitor to the mortgagee to prepare the mortgage deeds; and the expenses attending which are invariably defrayed by the mortgagor.* Also, in leases, it is usual for the solicitor to the lessor to prepare the lease.

H. B. A.

QUERIES.

NEGLECT OF TRUST.

A. and *B.*, by bargain and sale duly enrolled in the Common Pleas, *accepted* a trust *under hand and seal*, to sell certain freehold estates, and in the mean time to receive the *rents and profits* of the estates. *A.* and *B.* both *acted* in the execution of the trust — both signed the conveyance of the property — and both signed the receipts for the purchase money — and both had a *controlling power* over the trust fund. The trusts were fulfilled, excepting the last, namely, to pay the balance to the *cestui que* trust, his executors, &c. The *rents and profits* for six years have not been accounted for by either *A.* or *B.*, amounting to some thousands. *A.* received the rents, with the privity and knowledge of *B.*, absconded and died. Is *B.*, the sole surviving trustee, liable to make good the amount of the rents and profits, and the balance of the purchase money? There is the usual clause in the deed, that each shall be answerable only for his own acts, receipts, and defaults.

FILIATION. — BANKRUPT.

If a person gives his own personal bond to the overseers of a parish, as an indemnity for the maintenance of a child, is he absolved from the bond after he has been made a bankrupt? Is not the parish obliged to prove for the arrears only up to the date of the commission? Is the bond still available? and if so, by what process is it recoverable?

PRACTICE.

An original subscriber to the Legal Observer having frequently experienced the inconvenience complained of in *C.*'s letter (No. 43.), begs to

* *Parker* v. *Thacker*, 3 Lev. 70.

† 3 Bulstr. 195.

‡ Preston on Abstracts, vol. ii. p. 161.

§ *King* v. *Cotton*, 2 P. W. 637. 3 Atk. 449. 1 T. R. 597.

* Our correspondent *C.* enquired, as we understand him, not as to preparing mortgage deeds, but re-assignments or re-conveyances of the mortgaged premises.

join in *C.*'s request to the Editor to lend his aid in furnishing the information alluded to in the second paragraph. On the following point, which is of great importance, and of very frequent occurrence, the subscriber has found much diversity of opinion, viz. whether, under the common power in wills and settlements of sale of real estate, and of the re-investment of the purchase money, the solicitor of the trustee, or the solicitor of the person for the time being entitled to the rents and profits, generally a tenant for life, is entitled to investigate the title, and prepare the conveyance of the purchased lands. The subscriber has found distinctions raised on the different forms of the conveyance or demise to the trustees.

MISCELLANEA.

PREPARATIONS FOR THE BAR.

In early times, by the orders of the Inner Temple, no one could have been called to the bar under *eight* years, subsequently reduced to *seven*. During this period, the student (unless he were called *ex gratiâ*) was to perform twelve grand moots, and twenty-four petty moots, at some Inn of Chancery. (*Dugd. Orig.* p. 159.) In the Middle Temple there was a similar order made, 11 James 1., that no one should be called to the bar under seven years' standing. (*Ibid.* p. 191.) So in Gray's Inn, by an order made, 5 Charles 1., no gentleman could be called to the bar, unless he had been seven years usually in commons in that society, or of two years' continuance usually in commons in an Inn of Chancery, and five years at least in usual commons in this house. (*Ibid.* p. 281.)

This was carried still farther in 1 Elizabeth, when the benchers of the Middle Temple prohibited the utter barristers from pleading at any bar until they were of *twelve* years' standing. This prohibition issued by command of the Judges (*Ibid.* p. 191.); but in 1635 it appears to have been relaxed. It was then directed, that there having been, heretofore, divers acts made by the preceding benchers to restrain the too early practice of young barristers, which it was recited did suit not so well unto these times, the Masters of the Bench therefore ordered, "that no young barrister presume to take upon him to practise in any of the Courts at Westminster before he have been full *three* years at the bar at least, upon pain to be corrected before the Bench, and fined, or otherwise dealt with, as to them in their discretions shall seem meet. Neither do they intend to call any to the bar hereafter, other than such as have their full time, and are otherwise qualified thereunto, as the orders of the house do require: and therefore they enjoin the gentlemen under the bar to apply and follow their studies to keep the case, to perform their exercises, to order their habits and hair to decency and formality, according to the orders of the house; and to yield due respect and observance to the benchers and antients, their governors, as they expect and desire the preferment to the degree of the bar, or otherwise care to be liable to the censure of the Bench; or (as the cause shall require) to be cut off from the society."

LORD HARDWICKE'S CHARACTER, BY LORD CHESTERFIELD.

Lord Hardwicke was, perhaps, the greatest magistrate this country ever had. He presided in the Court of Chancery above twenty years; and in all that time none of his decrees were ever reversed, nor the justness of them questioned. Though avarice was his ruling passion, he was never in the least suspected of any kind of corruption,—a rare and meritorious instance of virtue and self-denial under the influence of such a craving, insatiable, and increasing passion. He had great and clear parts; understood, loved, and cultivated the belles lettres. He was an agreeable, eloquent speaker in parliament, but not without some little tincture of the pleader. Men are apt to mistake, or at least seem to mistake, their own talents, in hopes, perhaps, of misleading others to allow them that which they are conscious they do not possess. Thus, Lord Hardwicke valued himself more upon being a great minister of state, which he certainly was not, than upon being a great Chancellor, which he certainly was. All his notions were clear, but none of them great. Good order and domestic details were his proper department. The great shining parts of government, though not above his parts to conceive, were above his timidity to undertake. Though he had been Solicitor and Attorney General, he was by no means what is called a prerogative lawyer; he loved the constitution, and maintained the just prerogative of the Crown, but without stretching it to the oppression of the people. He was naturally humane, moderate, and decent; and when by his former employments he was obliged to prosecute state criminals, he discharged that duty in a very different manner from most of his predecessors, who were too justly called the blood-hounds of the Crown. He was a cheerful, instructive companion, humane in his nature, decent in his manners, unstained with any vice, (avarice excepted), a very great magistrate, but by no means a great minister.

We avail ourselves of this opportunity to notice, in reference to a statement contained in a recent Number, p. 240. *antè*, regarding Lord Morden, which we inserted on the authority of Mr. Parkes' History of the Court of Chancery, that the circumstances were positively contradicted by the surviving relatives of the deceased;—a contradiction of which we were not then aware; we are decidedly averse from inflicting unnecessary pain on any individual, and least of all should we do so on the descendants of a distinguished ornament of the profession.

The Legal Observer.

VOL. II. SATURDAY, SEPTEMBER 10. 1831. No. XLVI.

——— "Quod magis ad nos
Pertinet, et nescire malum est, agitamus."
HORAT.

THE LIFE AND CHARACTER OF LORD CHANCELLOR BROUGHAM.

(*From the North American Review.*)

IT will no doubt be interesting to our readers, as it has been to ourselves, to peruse the account which our transatlantic brethren have given of the present Lord Chancellor. The voluminous article from which we make the present selections enters into some political details which are beside our views; and for the sake of brevity, as well as the adherence to our plan, we shall extract those parts only which appear more or less applicable to the professional career of his Lordship. Passing over the introductory remarks, we come at once to the Memoir.

"Henry Brougham was born in Westmoreland in 1769 [1779]. Of his early life we have been able to ascertain little more than that he was educated in Scotland. It would be interesting to know what promise his infancy gave of his future greatness. It would gratify a natural curiosity to be informed whether they who saw the seedling germ, predicted the majestic height and wide-spreading luxuriance of the full-grown oak. We may infer, however, with sufficient certainty, from the subsequent character of the man, that the boy must have been great among boys. It is probable that he was even then distinguished for clearness and quickness of apprehension, force of thought, energy of expression, and decision of character. He was, it is likely, no idler; but, warned by some mysterious instinct of the part he was destined to act on the great theatre of human affairs, he gathered with patient toil and treasured up in his mind vast stores of knowledge for his yet undeveloped faculties to act upon in future years. He could not have been a genius, if a genius be what a real genius has lately been described to be, "an idle, irregular, vagabond sort of a personage, who muses in the fields, or dreams by the fireside, whose strong impulses must needs hurry him into wild irregularity or foolish eccentricity; who abhors order, and can bear no restraint, and eschews all labour." On the contrary, it is very probable, that he laboured intensely, and was, perhaps, spoken of by his schoolfellows as a hard-working fellow,—but no genius. At all events, it is certain that his whole after life has been a practical declaration of a deeply seated conviction of the paramount importance, the indispensable necessity, of earnest, unwearied, unremitting labour. His whole life bears witness to his belief, that nothing worth having can be gained without effort; but that by steady persevering effort every thing may be gained.

"We first hear distinctly of Mr. Brougham as a member of a celebrated debating society in Edinburgh. There he trained himself in the arts of logical offence and defence. There he prepared himself, by assiduous self-discipline in mock encounters, for the more strenuous contests of after years, when the buttons were to be off the foils, and shields were to be stricken with the sharp end of the spear, until they should ring again. Success, more brilliant than fancy could have pictured or hope have prophesied to the youthful aspirant, was destined to crown his labours.

"About this time, while he was not yet twenty years of age, he wrote and communicated papers on the higher geometry to the Royal Society of London. These papers were ordered to be printed in the Transactions of that Society, and they were read, admired, and commented on in foreign tongues. This was his first great triumph, and a great triumph indeed it was. We can hardly conceive a worthier commencement of his glorious life. Perchance we may be singular in our opinions; but we do look upon these purely intellectual achievements as conferring a far more enviable distinction upon a man, than the proudest military triumphs. We would have the feelings of Franklin, when with a kite and a hempen string he brought the lightning from the clouds, rather than those of the Duke of Wellington after the battle of Waterloo. And therefore we think it by no means the least honourable circumstance of Brougham's career, that at so early an age, when he was, in fact, but a mere boy, he should have been able to communicate such papers to such a society; that they

should be deemed worthy to be published in that great record of their collected wisdom, through which Newton was proud to give some of his most splendid discoveries to the world, and that they should have attracted the attention, and been honoured with the comments of the philosophers of the Continent.

"In 1813, in the thirty-fifth year of his age, Mr. Brougham published an elaborate work on the Colonial Policy of the European Powers, which added much to a reputation already brilliant. About the same time also he became a contributor to the Edinburgh Review, which periodical had been established some years before, and had espoused the principles of the Whig party. Of this Review, he has ever since been one of the chief ornaments and supporters. He has contributed to its pages many of its best articles on various subjects of literature and science, seeming equally at home and at his ease in either walk. As we do not intend to recur again particularly to his scientific or literary labours, we will mention here that he is the author of several papers in Nicholson's Journal, of which we cannot fix the date. While thus engaged in laying deep and strong the foundations of his fame in a broad and comprehensive knowledge of men and things, and their infinitely diversified relations, he did not neglect the more dry and abstruse investigations through which lies the road, and the only road, to legal distinction. He had chosen the profession of the law; and to choose a profession, and to determine to be among the most distinguished of its members, were to him one and the same thing. He set about giving effect to this determination with all that energy of will, and perseverance of effort, which he had already displayed so conspicuously in other pursuits. All our readers, probably, know how splendid was his success; and will pardon us, if we hasten to the commencement of his parliamentary career.

"He was about twenty-eight years of age when he first took his seat in parliament, having been returned for Camelford, a borough in the interest of the Duke of Bedford. It was a period crowded with great events. The world was then agitated by the all-grasping ambition of one extraordinary man. Nothing seemed to be exempt from his power. He overturned thrones and subverted governments."

The parliamentary career of Mr. Brougham is first illustrated by the Reviewer on the subject of the memorable *Orders in Council* of November, 1807, against which the commercial bodies of London, Liverpool, and Manchester, had strongly petitioned. Mr. Brougham was their advocate in the House of Commons. On the first occasion he was unsuccessful; but after the lapse of four years, and the experience which they brought, the petitions for repeal were renewed.

"Mr. Brougham moved that evidence should be heard at the bar of the House of Commons on the state of the country. Contrary to general expectation, according to the wish, rather than the hope of the petitioners themselves, the motion prevailed. Evidence was introduced. Mr. Brougham himself took the lead in the examination; which was continued near a month, until the House was saturated with information as to the existence and the cause of the general distress. He then, in a speech of great eloquence and power, urged the immediate repeal of the obnoxious and ruinous edicts.

"His power had been felt before; but in this debate he first put forth his whole strength. He showed himself to be armed with a perfect knowledge of the whole merits of the question, and he used his knowledge with wonderful skill. He exposed, with irresistible sarcasm, the absurdity and ruinous character of the ministerial policy; and he alarmed the fears and aroused the sympathies of the House, by vividly picturing the uneasy and distressed condition of the country. It is scarcely necessary to add, what nearly all our readers know, that he went out of this debate triumphantly. The Orders in Council were rescinded on the 23d of June, 1812."

The next subject which the writer selects, is the service which the cause of *popular education* has received from the talent and energy of Lord Brougham.

"In England, education had never been made a national concern. Individuals of every rank, from the monarch down to the humblest of his subjects, had, from time to time, appropriated large sums to this object; but the nation, as a nation, had never done any thing for it. It became necessary, therefore, if Parliament should determine to take this matter into their own hands, to ascertain how far their individual contributions went towards accomplishing the object of a national education, before it could be known how much must be supplied from the public treasury. It was very generally understood, that numerous instances existed of most reprehensible mismanagement and misapplication of the funds devoted by private munificence to this truly pious purpose. Every lawyer knew this perfectly well. In the sixth volume of the Term Reports, we find Lord Kenyon remarking, in one of his opinions, that 'whoever will examine the state of the grammar schools in different parts of the kingdom, will see to what a lamentable condition most of them are reduced. If all persons had equally done their duty, we should not find, as is now the case, empty walls without scholars, and every thing neglected but the receipt of the salaries and emoluments.' And in the thirteenth volume of Vesey's Reports, Lord Eldon is represented as solemnly and sternly denouncing, from the bench, the general mode of dealing with the charity estates all over the kingdom, as 'grossly improvident, amounting to a direct breach of trust.'

"Mr. Brougham's first efforts were, of course, to be directed to the exposure and correction of these abuses. In 1816, he began by moving for a committee to enquire into the state of education among the lower orders of the metropolis. The alarm and clamour with which the first proposal to extend the blessings of education to

the working classes had been received, had subsided, and was become disreputable. The motion, therefore, was not opposed. An Education Committee, consisting of forty members, taken indiscriminately from both sides of the House, was appointed, and Mr. Brougham was placed at the head of it."

Passing over some of the details on this subject, we select only a portion of his Lordship's speech on introducing, in 1819, a bill to extend the powers of the Education Committee.

"'It is enough to observe of the remedy under the statute of Charitable Uses, that it leads him who pursues it, sooner or later, into the Court of Chancery; and in truth, as the law now stands, that well known Court is the only refuge of those who complain. See then the relief held out to us by those who oppose, or threaten to oppose, this measure, and who bid us resort to the ancient law of the land! It is admitted to be true, that glaring abuses every where prevail; true, that hardly a parish or a hamlet can be found where complaints are not heard; true, that the highest judicial authority proclaimed the extent of the grievance; true, that a Committee of the House of Commons, thirty years ago, vehemently urged you to afford redress. But your remedy is at hand, say the objectors,—what reason have you to complain? Is not the Court of Chancery open? Come, all ye who labour under the burden of fraud and oppression, enter the eternal gate of the Court of Chancery! True, you are the poor of the land,—the grievance you complain of has robbed you of every thing; but, though penny-less, you are not remediless; you have only to file a bill in equity, and the matter will take its course! Why, if there be nothing in the reality, there is something in the name of the Court of Chancery, that appals the imagination and strikes terror into the unlearned mind. I recollect the saying of a very great man in the Court of King's Bench. The Judge having said of his client, "Let him go into a Court of Equity," Mr. Erskine answered, in an artless tone of voice, that made Westminster Hall ring with laughter, "Would your Lordship send a fellow-creature there?" There may be some exaggeration in the alarms created by the bare name of this Court; but, as long as it exists, a barrier is raised against suitors, who only seek redress for the poor, though no bars of oak or of iron may shut them out. Yet that the prevailing panic has some little foundation, I will show you by a fact. This remedy has only once been resorted to since 1787, and I am now enabled to state the result. The commission was executed in 1803; and in 1804, a decree was made, and the Court was petitioned to confirm it. Exceptions were taken as usual. Much and solemn argument was held; and I will venture to say, from what I know of that Court, the case was most learnedly and plentifully debated. In 1808 the matter was deemed ripe for a decision; and, to use a technical but significant expression, it has *stood over for judgment*. Now, in the language of the profession, "*this is my case.*" If any one tells me that the statute of Charitable Uses affords a remedy, I answer, that the grossest abuses being every where notorious, this remedy has been only thrice resorted to for above half a century, and only once within the last thirty years; and I bid him look at the fate of that one attempt to obtain justice.'"

Leaving the remarks, which relate to the efforts of Lord Brougham as a statesman, on the subject of "the Holy Alliance" in 1815, and on the agricultural and other distresses of the country in 1816, we select another specimen of his oratorical powers in the following:—

"'Sir, if one page in the history of the late Congress be blacker than another, it is that which records the deeds of the noble Lord (Lord Castlereagh) against Genoa. When I approach this subject, and reflect on the powerful oratory, the force of argument, as well as of language, backed by the high authority of virtue — a sanction ever deeply felt in this House — once displayed in the cause of that ill-fated republic, by tongues now silent, but which used to be ever eloquent where public justice was to be asserted, or useful truth fearlessly inculcated, I feel hardly capable of going on. My lasting sorrow for the loss we have sustained, is made deeper by the regret that those lamented friends live not to witness the punishment of that foul conduct which they solemnly denounced. The petty tyrant, to whom the noble Lord delivered over that ancient and gallant people, almost as soon as they had, at his call, joined the standard of national independence, has since subjected them to the most rigorous provisions of his absurd code; a code directed especially against the commerce of this country, and actually less unfavourable to France.

"'Thus, then, it appears, that, after all, in public as well as in private, in state affairs as well as in the concerns of the most humble individuals, the old maxim cannot safely be forgotten, that "honesty is the best policy." In vain did the noble Lord flatter himself, that his subserviency to the unrighteous system of the Congress would secure him the adherence of the courts, whom he made his idols. If he had abandoned that false, foreign system, if he had acted upon the principles of the nation whom he represented, and stood forward as the advocate of the people, the people would have been grateful. He preferred the interests and wishes of the courts; and by the courts he is treated with their wonted neglect. To his crimes against the people all over Europe, to his invariable surrender of their cause; to his steady refusal of the protection which they had a right to expect, and which they did expect, from the manly and generous character of England, it is owing, that if, at this moment, you traverse the Continent in any direction whatever, you may trace the noble Lord's career in the curses of the nations whom he has betrayed, and the mockery of the courts who have inveigled him to be their dupe.'"

From this vehement invective, our American contemporary proceeds to the trial

of the Queen, the affairs of Spain, and other matters, some of a domestic nature, on which his Lordship's efforts were bestowed. He then enters on the question of the *Reform of the English Law*, and the following is the description given of the celebrated speech on that subject:—

"It is, perhaps, not saying too much of this speech, to affirm that there is not one, either ancient or modern, that contains a larger amount of information, all bearing with admirable adaptedness and resistless effect upon the very question under consideration. In this speech he brought before the House the whole condition of the common law. No nook of the immense field had escaped his observation. He went into every dark corner and hidden recess, as into familiar and frequented haunts. And to this great knowledge of what the law was, he added a clear and sound understanding of what the law should be. While he pointed to the evil, he did not omit to indicate the remedy. All that he said, was said with so much distinctness and simplicity, that no idea could be misunderstood; yet with such force and energy, that no mind could remain unimpressed. He concluded with his celebrated motion for the Reform of the Law; 'That an humble address be presented to his Majesty, praying that he will be graciously pleased to issue a commission for enquiring into the defects occasioned by time, or otherwise, in the laws of this realm, and into the measures necessary for removing the same.' He afterwards, for the sake of conciliation, made this motion less broad, by substituting the administration of justice in the Superior Courts, and the Law of Real Property, as objects of enquiry, instead of the Laws of the Realm generally. Thus modified, the motion was carried unanimously. The commissions were issued by the Crown, and the Reports of the Commissioners have been elaborate and valuable. There is a spirit now awake on this subject that will not slumber again, until, instead of the present cumbrous and unintelligible system of law, and Courts like that far-famed labyrinth, into which if a man once entered he never found his way out again, England shall have a simple and intelligible code of laws, and a cheap and prompt administration of justice. Mr. Brougham has already done much. He well understood what was to be done, and how it was to be done; and he went to work cautiously, as a man should, who is dealing with the veins and arteries of the social system."

The Reviewer next takes up the examination of his Lordship's labours *out of Parliament*, and commences with his views on the subject of education, which he describes as exceedingly broad and comprehensive.

"He fixes the period of commencement at the dawn of the intellect, and looks upon an education as complete only when life is ended. He would have the infant go to school, the boy go to school, and the man go to school. He would have established, every where, infant schools, elementary schools, and adult schools Of the first, he has been from the beginning a zealous, constant, and efficient friend; to his exertions in behalf of the second, the Journals of Parliament bear witness: of what he has done for the third, we are now to speak. And, to begin, we will explain what we understand by an adult school. We understand, then, any association of grown-up persons for the purpose of acquiring knowledge. The Lyceums and Mechanics' Institutes, which, within these five years, have begun to be established in our country, are adult schools; and there are adult schools under other names, which we cannot now stop to enumerate. Mr. Brougham thought that the best thing he could do was to publish some plain account of such associations, proving their great utility, feasibility, and cheapness, with some directions for the management of their concerns. This he did in a pamphlet entitled 'Practical Observations on Popular Education;' a work unadorned and simple in its diction, as it is powerful in its argument, and beneficial in its tendency. Nearly the same course is recommended that has been generally pursued in the American Lyceums; to establish a course of lectures, make a beginning, and then to get a library and apparatus, the best that can be afforded, as soon as possible. In England, the great difficulty was to get books. There was, and perhaps is now, a heavy tax on paper, greatly increasing their price; and this tax is as heavy on the coarsest as on the finest sorts. To get rid of this difficulty as far as possible, a society was formed, having for its grand object the circulation of cheap publications, containing a large amount of information compressed into a small space, by crowding the page. This society, 'The Society for the Diffusion of Useful Knowledge,' owes its origin to the sole suggestion of Mr. Brougham; a suggestion that may justly be ranked among those great conceptions, which shed unfading glory upon a noble band of deeply thinking men of all ages, and have influenced, do now influence, and will continue to influence the condition of man for ever. That this praise may not seem extravagant, let us attend to what the Society has done. Immediately after its formation, it commenced the publication of the 'Library of Useful Knowledge.'"

After describing, in detail, the various works which have issued from the press of "The Society for the Diffusion of Useful Knowledge," and stating the extraordinary extent of their circulation, the writer ascribes the whole as "the splendid result of Mr. Brougham's suggestion."

"The whole has been brought about under his immediate superintendence; and not a little of it has been his individual work. If the whole labours of a long protracted and laborious life had been directed to this result, they would have been well directed. By originating this magnificent scheme of public instruction, Mr. Brougham has brought the whole world in his debt. And how incalculably is that debt swelled, when we reflect, that the operation of this

mighty agency has but just begun to develope itself; that it will continue to act, with undiminished force, and over an ever-widening extent,

'When we and ours have rendered up our trust,
And men unborn shall tread above our dust.'

We cannot leave this part of our subject, without mentioning, though we can do no more than mention it, that Mr. Brougham was the father of the London University; an institution which has had the good effect of calling into existence a rival seminary of learning, King's College; while it has placed the benefits of a scientific education within the reach of thousands, who had, before that time, been excluded from any participation in its advantages.

"We are now," continues our contemporary, "to contemplate Mr. Brougham for a moment as the able champion of the injured and downtrodden children of Africa. From the commencement of his parliamentary career, he has been the strenuous and eloquent advocate of every measure tending to meliorate their condition. In 1810, in consequence of the attempts to evade the prohibition of the Abolition Acts, he moved in the House of Commons, 'That this House will, early in the next session of parliament, take into consideration such measures as may tend effectually to prevent such daring violations of the law.' In the course of the debate on this motion, he pledged himself to bring in a bill for punishing slave-trading as felony. The motion was carried unanimously, and in the next session he did introduce a bill declaring 'all dealing in slaves by British subjects, or persons within the British dominions, a felony, punishable by transportation, or imprisonment and hard labour, at the discretion of the Court which tries the offence.' This bill passed into a law, and has the high merit of being the earliest public recognition of the principle, that the traffickers in human flesh are pirates, and ought to be treated as such. Mr. Brougham subsequently turned his attention to the condition of the slaves in the West Indies. His humane exertions in behalf of that friendless and unfortunate race of men are above all praise. But a few months have gone by, since he moved, in the House of Commons, 'That this House do resolve, at the earliest practicable period of the next session, to take into serious consideration the state of the slaves in the Colonies of Great Britain, in order to the mitigation and final abolition of their slavery, and more especially in order to the amendment of the administration of justice within the same.' In his speech in support of this motion, he placed the question on higher ground than that of simple expediency. He went to the bottom of the merits of the case, and denied utterly the fundamental principle of slavery, that man may be the subject of property. 'There is,' he exclaimed, 'a law above all the enactments of human codes; the same throughout the world, the same in all times; such as it was before the daring genius of Columbus pierced the night of ages, and opened to one world the sources of power, wealth, and knowledge—to another, all unutterable woes; such it is at this day; it is the law written by the finger of God on the heart of man; and by that law, unchangeable and eternal, while men despise fraud, and loathe rapine, and abhor blood, they shall reject, with indignation, the wild and guilty fantasy that man can hold property in man!' This motion, however, was negatived; and here the subject rests for the present."

The writer then adverts to Mr. Brougham's election for Yorkshire, and his subsequent elevation to the peerage, and the office of Lord High Chancellor. Speculating on the course which other ministers may adopt, our contemporary entertains no doubt that Lord Brougham will go straight on in his old course, observing that "the momentum he has acquired in it is too great to allow him to stop if he would. Having already done so much, he must do more." And he thus sums up his character:

"He has powerfully influenced the character of his age. His example of earnest, devoted, persevering labour to accomplish noble ends by noble means, has been long before the world. If we were called upon to name the man, who, in our opinion, has done more for the human race, we confess we should not know where to look. Franklin alone, in modern times, may be compared to him as an instance of what one man, animated by a noble and enlarged philanthropy, may accomplish for his fellow-men; and, in his great efforts for the diffusion of knowledge, he seems, constantly, to have held the example of Franklin in full view.

"From his youth up he has shunned no toil, however severe. His whole life has been a life of immense labour, a series of great exertions. He has evinced, on all occasions, a large and comprehensive benevolence; a sound and practical judgment; united with a genius of the loftiest and most universal character. We do not know that a single one of the numerous schemes of momentous importance which he has originated, can be said to have finally failed. It may be added,—and it is a far nobler tribute to his character,—that there is not one of them all, which has not, for its object, an improvement in the condition of some large portion of the community. Of the universality of his genius, the universality of his attainments furnishes sufficient evidence. He is one of the most profound scientific men of his day. Long and severe study has familiarised him with the teachings of the dead and of the living. He has succeeded, if we may so speak, in transfusing into himself the spirit of ancient literature; and no inconsiderable portion of the modern is his own work. He seems to know the history of past ages as if he had lived in them; and his published writings show how thoroughly he understands the condition of the present. He is a master of the English law, the most complicated and difficult of all the sciences; a science, to ascend whose heights and fathom whose depths demands strong powers strongly exerted. These are his attainments. The sum so far outgoes the ordinary reach, even in cases where no little

talent is combined with no little industry, that we should suspect ourselves of over-statement, did we not find that other writers, with better opportunities, more than bear us out. The author of 'Attic Fragments,' who cannot be said to be over partial to Mr. Brougham, says that 'one would imagine that he had realised the ancient Scythian fable, by killing the foremost man in every department of knowledge, and possessing himself of all their intellectual inheritances.' It matters not what the subject is, however sublime or however commonplace, however abstruse or however practical;—Brougham knows it, and knows it completely.

"But what deserves our more especial notice and admiration is, not the splendour of his natural endowments, not the vast extent and rich variety of his acquisitions, but the use to which he has devoted them all. He has set them apart for the service of mankind. He has a title more glorious than kings can give or schools bestow, — a title conferred upon him by the unsolicited suffrage of the world. He is the advocate of human liberty. It cannot be said of him, as of Burke, that he

——— 'narrow'd his mind,
And to party gave up what was meant for mankind.'

No; what was meant for mankind, he has given to mankind. We have adverted to his exertions in behalf of the suffering slaves; but it is not in this poor sense alone that he deserves his glorious title. He would not emancipate the body only; he would set free the mind, and he would set it free by making it capable and worthy of freedom. His great principle seems to be, Let an enslaved nation be enlightened, and there is no power on earth, that can detain it from freedom; let a free people be enlightened, and there is no power on earth that can reduce it to bondage. And therefore it is, that he has laboured so earnestly to diffuse knowledge far and wide. The old Roman cry was, 'Give the people Tribunes, to guard their rights.' Mr. Brougham exclaims, give the people knowledge, and they will guard their rights for themselves. He said, long ago, 'Tyrants may well tremble now, for the schoolmaster is abroad.' And, more than any man, he has aided in sending him abroad. He prepared the way in England, by his laborious investigations into the condition of public charities; and, though those who fear the power of the schoolmaster have, as yet, by clamorous appeals to interest, and ignorance, and prejudice, greatly obstructed his efforts to induce government to take a share in the glorious work of instructing the people, there is now no longer any reason to apprehend that this part also of his great plan will not finally be adopted. In the mean time, as if he thought life not long enough to study in, he has recommended and promoted the establishment of infant schools, that instruction may begin with the very first developement of the capacity to receive it. At his suggestion, too, a society has been formed, which is as a schoolmaster not only to England, but to France and to America. To him, likewise, may be referred the origin of of those numerous associations, which, under different names, have for their common object self-instruction and mutual improvement. The united influence of all these agents is like that tree of the East, whose branches, after spreading on all sides, bend to the earth, and take root again and spread still further; yet again to take root at a still greater distance from the parent stem, and to spread yet wider still. Its effects are already visible in the increased demand for useful information, in the augmented and augmenting number of new publications to satisfy that demand, and in the generally improved character of the periodical press. He would be a bold man, who should venture to say when, or where, or by what boundary, the operation of this influence is to be circumscribed.

"And all this Mr. Brougham has accomplished while yet in the vigour of life. — What, then, may not be expected of him, should he be spared to the green old age of Franklin? Hitherto he has neither had official rank nor official influence to aid him. Now he has both. And we cannot believe that he will do less, because he has power to do more. He has hitherto been an independent man. To secure his independence, he has laboured hard in his profession. We cannot think that he will cease to be so; that he will approach the throne without carrying his principles along with him. It seems to us little less than absurd, to say of a man, whose hours, devoted to the advancement of the best interests of mankind, have been 'frequently stolen from needful rest,' that he will not devote to the same great cause the accidental influence of office; or that he, of whom we are told that 'he has hung over the lamp of study, till not all the bloom of life merely, but even the energy of life itself, seems on the very verge of extinction,' will now turn away from his glorious work, and so blast the splendid fame and the lofty self-approbation for which he has made all this sacrifice. No; we find ourselves utterly unable to believe that he has made such an oblation to the lust of power. And we look to see him labouring strenuously, as heretofore, in the same great cause; and finding an abundant reward for his toils in the applause of his own heart, and in the admiration and gratitude of mankind."

We conclude with the following remarks on Lord Brougham as an *orator*:—

"His figure is said to be any thing but graceful. His features are almost harsh and repulsive; yet so strongly marked, that none can see him, though but once, and go away under the impression that he has left an ordinary man. His action is not very elegant; but if we include under that name the whole of delivery, gesture, the tone of the voice, and the expression of the countenance, then his power in this department is probably not inferior to that which is displayed in his reasoning and language. The action of his mind, and especially the tremendous talent of invective by which he is eminently distinguished, have never been better or more forcibly described than by the author of the 'Attic Fragments.' We shall make no apology, therefore, for laying an extract before our read-

ers, and with it we shall conclude. It is taken from a description of Brougham's terrible attack upon Canning in the year 1823. The cause of the attack will be explained in the quotation. The two men are first exhibited in contrast: —

" 'Canning chose his words for the sweetness of their sound, and arranged his periods for the melody of their cadence; while, with Brougham, the more hard and unmouthable the better. Canning arranged his words like one who could play skilfully upon that sweetest of all instruments—the human voice; Brougham proceeded like a master of every power of reasoning, and of the understanding. The figures and allusions of the one were always quadrable by the classical *formulæ*; those of the other could be squared only by the higher analysis of the mind; and they soared and ran, and pealed and swelled on and on, till a single sentence was often a complete oration within itself; but still so clear was the logic, and so close the connection, that every member carried the weight of all that went before, and opened the way for all that was to follow after. The style of Canning was like the convex mirror, which scatters every ray of light that falls upon it, and shines and sparkles in whatever position it is viewed. That of Brougham was like the concave speculum, scattering no indiscriminate radiance, but having its light concentrated into one intense and tremendous focus. Canning marched forward in a straight and clear track; every paragraph was perfect in itself, and every coruscation of wit and genius was brilliant and delightful: it was all felt, and it was felt at once. Brougham twined round and round in a spiral, sweeping the contents of a vast circumference before him, and uniting and pouring them onward to the main point of attack. When he began, one was astonished at the wideness and obliquity of his course; nor was it possible to comprehend how he was to dispose of the vast and varied materials which he collected by the way; but as the curve lessened, and the end appeared, it became obvious that all was to be efficient there.

" 'Such were the rival orators, who sat glancing hostility and defiance at each other during the early part of the session for 1823. Brougham, as if wishing to overthrow the Secretary by a sweeping accusation of having abandoned all principle for the sake of office; and the Secretary ready to parry the charge, and attack in his turn. An opportunity at length offered; and it is the more worthy of being recorded, as being the last terrible personal attack previous to that change in the cabinet which, though it had begun from the moment that Canning, Robinson, and Huskisson came into office, was not at that time perceived, or at least admitted and appreciated. Upon that occasion, the oration of Brougham was, at the outset, disjointed and ragged, and apparently without aim or application. He careered over the whole annals of the world, and collected every instance in which genius had degraded itself at the footstool of power, or principle had been sacrificed to the vanity or the lucre of place; but still there was no allusion to Canning, and no connection, that ordinary men could discover, with the business before the House. When, however, he had collected every material that suited his purpose — when the mass had become big and black — he bound it about and about with the cords of illustration and argument; and when its union was secure, he swung it round and round with the strength of a giant and the rapidity of a whirlwind, in order that its impetus and its effects might be the more tremendous; and while doing this, he ever and anon glared and pointed his finger, to make the aim and the direction sure. Canning himself was the first that seemed to be aware where and how terrible was to be the collision; and he kept writhing his body in agony, and rolling his eyes in fear, as if anxious to find some shelter from the impending bolt. The House soon caught the impression; and every man in it was glancing fearfully, first toward the orator, and then towards the Secretary. There was — save the voice of Brougham, which growled in that under tone of muttered thunder which is so fearfully audible, and of which no speaker of the day was fully master but himself — a silence as if the angel of retribution had been flaring in the faces of all parties the scroll of their personal and political sins. A pen, which one of the secretaries dropped upon the matting, was heard in the remotest part of the House; and the *voting* members, who often slept in the side galleries during the debate, started up as though the final trump had been sounding them to give an account of their deeds. The stiffness of Brougham's figure had vanished; his features seemed concentrated almost to a point; he glanced toward every part of the House in succession; and sounding the death-knell of the Secretary's forbearance and prudence, with both his clenched hands upon the table, he hurled at him an accusation more dreadful in its gall, and more torturing in its effects, than ever had been hurled at mortal man within the same walls. The result was instantaneous — was electric. It was as when the thunder-cloud descends upon some giant peak — one flash, one peal, the sublimity vanished, and all that remained was a small and cold pattering of rain. Canning started to his feet, and was able to utter only the unguarded words, "It is false!" To which followed a dull chapter of apologies.' "

NOTES ON THE EARLIER CONSTITUTIONAL HISTORY OF ENGLAND.

BY A BARRISTER.

(*Concluded from p. 276.*)

HENRY II.

ALTHOUGH this reign is generally considered one of the most splendid England has seen, yet, considering it in a constitutional view, we shall find that very little progress was made. The feudal system, with all its chain of oppressions, still bore heavy on the country; and, although some of these were something lessened, yet it

was not till some years after that England herself began to see the evils under which she laboured, and to endeavour to free herself from so complicated a mass of tyranny. The monarch himself was a strict observer of feudal duties; and his barons, under his vigilance and enterprise, had to confine their power. But although this stifled many rebellions, we cannot say but that it did harm to the country at large. Warlike and tyrannical, they either turned their arms against each other, or swayed their little kingdoms with ferocious despotism. The condition of the lower classes was little ameliorated, and no man in the country could boast of freedom.

The character of Henry II. was great: he was brave, generous, affectionate, forgiving, and just. He was, however, as Becket said of him, "implacable when *thorough* angered;" though it must be confessed that it took a great deal to anger him thoroughly: that he had this quality, was shown in his conduct to his queen Eleanor, and to that prelate himself. He might have done more for his kingdom, had he not been constantly employed either in spiritual or temporal battles; as it was, little was done. I read Lord Lyttelton's life of this king, as also the Rev. Joseph Berington's. The former stands forward as his vindicator, and the accuser of the archbishop; the latter takes the opposite view of the question. Both are of course unjust, though Mr. Berington has certainly the worse cause and the worse book.

RICHARD I.

Little or nothing was done for or against the constitution in this reign, occupied as it was with wars against the Saracens and French. The monarch was a strict observer of the feudal rights; the feudal system consequently flourished, as far as such a system can be said to flourish. Richard was virtuous for the twelfth century, and brave beyond that time of chivalry and personal courage. Little more can be said as to his character. In addition to the other books, I read this king's life by Mr. Berington, which appears one of the most unjust pieces of biography ever written. Every good action is written in water, every bad one in brass.

JOHN.

The name of this king immediately brings to the mind the plain of Runnymede and the charter granted there. We are all inclined to think a great deal of this, and to believe that it is as "great" as it is said to be. The truth is, however, that we are by no means able to judge of its value, so great a change has the English constitution undergone since the 19th of June, 1215, the day on which it was signed. It was certainly the first blow given to the feudal system, although as certainly not aimed at it. The barons, however, hardly knew what they were asking; they wished that the laws of Henry I. should be restored. Now, if the charter was a mere revival of these laws, then must the reign of Henry I. have been much milder then that of Henry II.: this we know was not the case, as the last mentioned reign was infinitely juster and more peaceable. If, again, they added to these laws, they obtained the charter under false pretensions. There seems very great obscurity thrown over the whole affair.

That John was a bad man, and a bad king, nobody can doubt. It has, perhaps, been the custom to abuse him more than he deserved. Certain it is, that we ought to look back with gratitude to that king who granted, and that reign which fostered, the fondest boast of England.

HENRY III.

It is surprising that in this reign, which appears either a struggle for power, or a mass of extortions, any thing could be done for the constitution; nevertheless, a great deal was done. The charter, with fresh privileges, was confirmed; the foundation of the House of Commons was laid; the feudal system was shaken; and in the strife of the barons with the Crown, the just power of both was ascertained with greater precision. Henry seems to have been rather weak than wicked, although his reign abounded in wickedness. I read the Statutes of this reign, at which time the usual editions commence.

EDWARD I.

Edward I. has been universally hailed as the founder of the present constitution of England. The House of Commons was established as a part of the government, although it had little to do but to agree to the proceedings of the king and barons. Great improvements were made in the administration of justice: the overbearing influence of the Crown vassals was lessened, without injuring their just liberties; the avarice, rapacity, and usurpations of the clergy were checked in a manner so effectual, that they never recovered their former power; the state of the lower classes received greater attention,

and the nation seemed by degrees to have released herself from the thraldom under which she had so long laboured. The repeated confirmations of the charters, although it proves that parts were occasionally infringed, served to keep up the memory that such things had been granted; and this was the more necessary, as laws were in that age only observed, whilst they were remembered.

Edward I. is justly considered as the greatest of our kings after the Conquest. He was, however, only great as a king: in his private character he was cruel and avaricious. The greatness of his spirit was shown in his darling plan of uniting the British Isles into one kingdom; it also displayed in vivid colours his rapacity, and his injustice, not to say treachery. I read Blackstone's edition of the Charters and the Statutes passed in this reign.

EDWARD II.

This reign, disfigured as it is by murder and rebellion on the one side, and oppression and weakness on the other, considered in a constitutional light, may yet have been of some service. The vigorous and oppressive reigns of the father and the son of Edward II. checked opposition and silenced faction. There wanted, then, this intervening space of weakness to allow the people to feel their power; nor was it long enough to admit of many abuses. All licentiousness was put a stop to in the succeeding reign, whilst a proper freedom was ensured. To the improper power which the people possessed in this reign may be attributed the just power they held in the succeeding ones.

The weak character of Edward was more disastrous to himself and his country than if it had been vicious. There is little in the statutes of this king.

EDWARD III.—RICHARD III.

The chief glories of these reigns were obtained sword in hand. The constitution, however, was not wholly unattended to by the kings; and it was watched with considerable care by the people. Little more than this can be said concerning the succeeding reigns of Richard II., Henry IV., Henry V., Henry VI., Edward IV., Edward V., and Richard III. The constant series of foreign wars and domestic broils necessarily prevented any great improvements in the administration of justice, or the modelling of the constitution. The nation was now distressed by cruel exactions to support ruinous and unprofitable foreign wars—now tyrannised over and harassed by the alternately powerful factions of York and Lancaster. The people, however, undoubtedly gained power, although slowly. Although the petitions of the commons were rarely complied with, yet the very petitioning was a step towards a revolution: the villeins began to lessen, and many laws were made in their favour; and the feudal system was fast falling into irrecoverable neglect. The statutes of this long period are generally unimportant.

HENRY VII.

This prince, in answering his private ends—in satiating his avarice, and exacting on his subjects—was of considerable service to his country in after ages. He effectually checked the overgrown power of the nobility, and that chiefly by raising them up rivals from the people. His vigilance and system of *espionnage*, although tyrannical and irksome to his subjects, yet enabled him to perceive abuses, and distribute justice, where no other means could have afforded him the opportunity. The statutes of his reign chiefly relate to the great check to feudal enormities, the alienation of tenures, and the barring entails by common recoveries, which were the chief improvements of the reign.

HENRY VIII.

The release of England from popish usurpations; the irrecoverable shocks given to the exorbitant power of the nobility; the freedom and alterations in the alienation of property; the universal rise gained by the people;—these circumstances, joined to the admiration of England, and the part she sustained in Europe during this long reign, tend to make us forget the cruelty and rapacity of the monarch, the meanness and subservience of the parliament, and the long course of complicated tyranny under which the country laboured. The nobility, however, were the principal sufferers; and they could well afford to lose: the people increased in power, wealth, and industry. The useful and elegant arts began to flourish, and the English navy began to be known and feared. In this reign England began to take an active part in the affairs of the Continent; and the motto adopted by Henry, "He will prevail, whom I favour," was not an unjust one. It must be gratifying to Englishmen, however they may repine at the power possessed by Wolsey, to think that in his hands was placed the balance of Europe; and that the favour of an English minister was the chief pursuit of two of the most powerful and greedy sovereigns the world ever

knew — Charles V. and Francis I. Indeed, the most splendid part of the reign was undoubtedly that portion which was under the administration of the cardinal, certainly one of the most wonderful and gifted men ever known in England. In this reign we begin to take an interest in the ministers and courtiers, as well as in the king and kingdom. Cranmer, Cromwell, Norfolk, Surrey, and many others, have been handed down to our admiration.

EDWARD VI. AND MARY.

I have classed these two reigns together, because they appear, during the short time they held any sway, to be equally deficient in constitutional information. Indeed, although nothing could be more opposed than the nature and dispositions of the brother and sister, yet there are circumstances in both of great similarity. The same disturbances, the same parties, and almost the same intolerance, existed in both; only in one the reforming party had the power, and in the other the popish. Indeed, the stigma on the reign of Mary seems a little unjust. By the broadest account, 284 people were martyred; at this all humanity recoils: but how will it be shocked, when we know that 70,000 people were executed in the reign of Henry VIII.; of which number it is surely reasonable to suppose, in that intolerant age, when it was said that men were burnt if they believed the supremacy of the pope, and hanged if they disbelieved it, that a large portion of this number suffered for religious opinions. We are also told by Blackstone, that many salutary laws were passed in the reign of Mary; for which, however, he gives a very uncharitable motive. He does not, however, mention them more particularly. Edward, mild and amiable as his character appears to have been, was very prejudiced, and hated popery more than he need have done. Indeed, under the direction of Northumberland, many cruelties were practised on the Catholics, which were only surpassed by those inflicted on the Reformers by the Catholics in the succeeding reign.

REVIEW.

The Practice of the Court of King's Bench, so far as the same is varied by the Acts 11 Geo. 4. and 1 Wm. 4. c. 70. "for the more effectual Administration of Justice in England and Wales," and of the several Acts subsequently passed relating to the Practice of the Superior Courts at Westminster, and the new Rules and Orders lately promulgated by those Courts; also, *the Practice of the Court of Error*, as now constituted, *with the Terms and Returns as altered, and a full Abstract of all the Acts and Copies of the new Rules and Orders; together with Bills of Costs in the Court of King's Bench, with Charges incidental to the Proceedings under the new Rules.* By Thomas Chapman, Esq., Assistant Master of the Court of King's Bench. Second Edition, enlarged. Maxwell, 1831.

We think it due to the author of this book to afford it an immediate notice. We need not remind a large portion of our readers that Mr. Chapman is a meritorious officer of the Court of King's Bench. He has held the appointment of Assistant Master for many years; and though it is his duty to curtail the charges of the practitioners according to the strict rules of taxation, we believe he has given them general satisfaction by the faithful but courteous execution of his trust.

We have another motive also in bringing this work to the early knowledge of our readers; we shall be able to extract from it some particulars bearing on the expected revision of the law of costs, and which at the same time will probably be useful in the office of every attorney at this the season of "making out bills of costs." Mr. Chapman has stated the charges which are allowed on taxation *incident to the new rules* of the last term; and of these, with a list of the general charges, we intend to put our friends in possession.

But we must first express our satisfaction that Mr. Chapman has devoted his attention to detail the various branches of practice in the Court to which he belongs, which have been varied by the several statutes passed in the present reign. Those statutes, as the readers of the Monthly Record are aware, consist, besides the general act "for the more effectual administration of justice," and the amended statute of the acts for *speedy judgment and execution, prohibition, — and* mandamus, *and the examination of witnesses.* The rules and orders promulgated at the end of last Trinity term have altered the practice very materially in many respects in all the Courts; and, as Mr. Chapman observes, so far as those rules extend, the practitioners who are conversant with the Courts generally can easily adopt the alteration in the forms and proceedings of the King's Bench to the practice of the other Courts. The author, however, has not confined

himself to these charges alone, but has furnished practical directions on other matters, which were essential to the completion of the work.

The following are the costs to which we have referred as incident to the new rules of last Trinity term, 1 Wm. 4.:—

Bail.

	£	s.	d.
If a defendant give notice of putting in and justifying bail at the same time, and the plaintiff require further time to enquire after them,			
Drawing notice of intention to require three days further time to enquire after the bail, copy and service	0	4	0
If the bail make the affidavit of sufficiency as directed by the rule,			
Instructions for bail's affidavit of their property in respect of which they justify, and of their residence within the last six months	0	6	8
Drawing and engrossing such affidavit (if included in one)	0	10	0
Attending the bail to be sworn	0	3	4
Paid oaths	0	2	0
Copy affidavit to accompany notice of bail	0	3	0

Declaration.

Drawing and fair copying particulars of demand to annex to declaration (or notice)	0	5	0

Rule to plead several matters.

Drawing short abstract of pleas to obtain order for leave to plead several matters	0	3	4
Paid for summons for leave to plead several matters, copy and service	0	5	0
Attending thereon	0	3	4
Paid for order, copy and service	0	5	0
Attending Clerk of the Rules with order, and to draw up rule	0	3	4
Paid for rule			
Copy and service	0	4	0

In those cases where no order is required.

Attending Clerk of the Rules with plea for rule to plead several matters	0	3	4
Paid for the rule			
Copy and service	0	4	0

Non pros.

Demand of declaration, replication, or other subsequent pleadings, copy and service	0	5	0
And if special pleading,			
Search for replication after demand	0	3	4

Record.

Copy particulars of plaintiff's demand to annex to record;			
The like of particulars of defendant's set off, 4*d.* per folio.			

Taxation of costs, in all cases.

Notice of taxing to attorney or agent	0	3	0
Notice of taxing to the party (according to the distance).			

It is not our present purpose to remark on the amount of these items, compared with the time and trouble in respect of which the allowances are made, nor in reference to the large diminution which has taken place in the aggregate sum by the abridgment of the pleadings: we must reserve that discussion for another opportunity. For the present, our object must be limited to putting the practitioners in possession of the scale of costs as now established; and, with this view, we shall advert to another part of Mr. Chapman's book, in which he furnishes some very useful tables of the general charges allowed in the Court of King's Bench. These will not only be practically available at all times in preparing bills of costs, but will enable those who are turning their attention to the revision of the rules of taxation to consider in what respects these general charges require alteration. We would especially notice the list of allowances for different kinds of *attendance*, and amongst these the fee for attending a summons before a Judge, which, where there is an actual hearing of the point, should evidently be increased. We observe that no increase has yet been authorised in regard to the abbreviated declarations, as prescribed by the new rules. The charges for drawing and ingrossing must, therefore, be taken at present at the ancient rate.

The following are the general charges referred to:—

Writs.

	£	s.	d.
Bill of Middlesex	0	9	0
Alias and pluries ditto	0	9	0
Latitat	0	12	0
Non omittas, ditto	0	15	0
Alias latitat and pluries	0	9	0
Attachment of privilege	0	9	0
Venire	0	6	6
Distringas	0	7	6
Subpœna	0	7	0
Ditto, Duces tecum, common length	0	10	0
Habeas corpus	0	15	0
Procedendo	0	15	0
Supersedeas	0	10	0
Habere facias possessionem, common length	0	12	0
Scire facias	0	15	0
Alias ditto	0	15	0
Capias ad satisfaciendum	0	8	0
Fieri facias	0	8	0

Attendances.

With client to swear affidavit	0	3	4
To instruct officer	0	3	4
To search for rule to plead	0	3	4
To file affidavit, and for office copy of ditto	0	3	4
To deliver particulars	0	3	4
To search if plea abided by after rule	0	3	4
For Master's rules	0	3	4
For Master's appointment	0	3	4

	£	s.	d.
To enter issue	0	5	4
To sign judgment	0	5	4
To set down cause	0	3	4
On country associate for postea	0	3	4
To complete final judgment at Westminster	0	3	4
To search if writ returned after rule	0	3	4
On counsel on common things	0	3	4
On counsel with brief on trial	0	6	8
To bespeak and examine paper book	0	6	8
To pay money into Court	0	6	8
To receive money out of Court	0	6	8
To put in bail	0	6	8
To justify bail	0	6	8
To oppose bail	0	6	8
To tax costs on posteas and all special things	0	6	8
To tax costs on enquiries and all common things	0	3	4
To attend Judge on summons	0	5	4
On the trial of a cause	1	1	0
On argument of special cause, or new trial, 13*s.* 4*d.* or	1	1	0
Other days when in the paper	0	6	8
Affidavits.			
Common, and oath	0	6	0
Of increase, drawing, and ingrossing, per folio	0	1	0
Special affidavits, instructions	0	6	8
Drawing, per folio	0	1	0
Ingrossing	0	0	4
Instructions.			
To sue or defend	0	6	8
For declaration, plea, replication, demurrer, and all pleadings	0	6	8
For special affidavits	0	6	8
For brief on trial of a cause	0	13	4
On common motions	0	3	4
To make rule absolute	0	3	4
Notices.			
Of trial	0	3	0
Of continuance	0	3	0
Of countermand	0	3	0
Of inquiry	0	3	0
Of taxing	0	3	0
Copy and service of Judge's summons	0	3	0
Of order	0	3	0
Ingrossing.			
Record, per folio	0	0	6
Special capias, ditto	0	0	6
Pluries, alias, &c. ditto	0	0	6
Writ of enquiry	0	0	4
Bill	0	0	4
Declaration, and all pleadings on paper, per folio	0	0	4
Copying.			
(In agency causes) of all pleadings for the country, as well as the party's own, as opponents	0	0	4
Copy præcipe for the filazer, per fol.	0	0	4
Term fee.			
Town cause	0	15	0
Agency, 14*s.* to 18*s.*, according to the distance of the county.			
Letter	0	3	6

Original.	£	s.	d.
Fee on	0	6	8
Ditto on capias	0	6	8
On testatum	0	6	8
Alias and pluries	0	6	8
On King's fine, if under 2*l.*	0	3	4
Beyond 2*l.*	0	6	8

We should not be justified in transferring to our pages the practical directions, which will come into early operation. For these we refer to the volume itself, which, having the advantage of being composed by a person in authority, may be relied on for its accuracy. We think it has been carefully written and well arranged, and can sincerely recommend it as a useful manual to the common law practitioner.

NEW BILLS IN PARLIAMENT.

LAW OF REAL PROPERTY. — INHERITANCE.

Analysis of a Bill for the Amendment of the Law of Inheritance.

THERE is no preamble to this bill. The enacting parts are as follow: —

1. The meaning and extent of the following words are defined: — "Land" shall extend to all kinds of hereditaments, corporeal or incorporeal, and however descendible, and to money to be laid out in the purchase of lands, and to chattels and other personal property transmissible to heirs; "the Purchaser" shall mean the person who last acquired the land otherwise than by descent, or by any escheat, partition, or enclosure, by the effect of which the land shall have become part of or descendible in the same manner as other land acquired by descent; "Descent" shall mean the title to inherit land by reason of consanguinity, as well where the heir shall be an ancestor or collateral relation, as where he shall be a child or other issue; "Descendants" of any ancestor shall extend to all persons who must trace their descent through such ancestor; "the Person last entitled to land," shall extend to the last person who had a right thereto, whether he did or did not obtain the possession or the receipt of the rents and profits thereof; "Assurance" shall mean any deed or instrument (other than a will) by which any land shall be conveyed or transferred at law or in equity; and every word importing the singular number only, shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only, shall extend and be applied to a female as well as a male.

2. Descent shall always be traced from the purchaser, and the last owner shall be considered to be the purchaser, unless the contrary be proved.

3. Heir entitled under a will of a testator who shall die after the 31st day of December, 1832, shall take as devisee, and a limitation to the grantor or his heirs shall create an estate by purchase.

4. Where heirs take by purchase under limit-

ations to the heir of their ancestor, after 31st of December, 1832, the land shall descend as if the ancestor had been the purchaser.

5. Land may be limited, after 31st of December, 1832, to a person and his heirs on the part of any lineal ancestor, and the descent shall be traced as if such ancestor had been the purchaser.

6. When there is a failure of heirs of the purchaser, the last owner shall be considered to be the purchaser.

7. Brothers, &c. shall trace descent through their parent.

8. Lineal ancestor may be heir to his issue in preference to collateral persons claiming through him; so that the father shall be preferred to a brother or sister, and a more remote lineal ancestor to any of his issue, other than a nearer lineal ancestor or his issue.

9. The male line to be preferred.

10. The mother of more remote male ancestor to be preferred to the mother of the less remote male ancestor.

11. Half-blood, if on the part of a male ancestor, to inherit after the whole-blood of the same degree; if on the part of a female ancestor, after her: so that the brother of the half-blood, on the part of the father, shall inherit next after the sisters of the whole-blood, on the part of the father and their issue; and the brother of the half-blood, on the part of the mother, shall inherit next after the mother.

12. After the death of an alien who has not been passed by in the descent, his descendants may inherit.

13. After the death of a person attainted, and who shall have died before such descent shall have taken place, his descendants may inherit, unless such land shall have escheated in consequence of such attainder before the 1st day of January, 1833.

14. The act not to extend to any descent which shall take place on the death of any person who shall die before the said 1st day of January, 1833.

15. Limitations made before the 1st of January, 1833, to the heirs of a person then living, shall take effect as if the act had not been made.

DOWER.

Analysis of a Bill for the Amendment of the Law relating to Dower.

The 1st section defines the meaning of the words in the act, namely, "Land," which extends to all kinds of hereditaments; and where the singular number is used, it includes several persons and things.

2. Widows to be entitled to dower out of equitable estates.

3. Seisin shall not be necessary to give a title to dower, although the husband shall not have recovered possession, provided such dower be sued for in the time during which such right of entry might be enforced.

4. There shall be no dower out of estates sold or devised.

5. Partial estates and charges created by the husband, and his specialty debts and engagements, shall have priority over dower.

6. Charges and incumbrances may be apportioned between the widow and heir, &c.

7. Dower may be barred by a declaration in a deed executed by the husband.

8. Or by a declaration in the husband's will.

9. Dower shall be subject to any restrictions expressed in the husband's will.

10. Devise of real estate to the widow shall bar her of all right of dower in any land of her husband, unless a contrary intention appear.

11. Bequest of *personal* estate to the widow, shall *not* bar her of dower, unless a contrary intention appear.

12. Agreement or covenant not to bar the wife of dower, may be enforced in equity.

13. Legacies to widows in bar of dower to be still entitled to preference over other legacies.

14. Dower *ad ostium ecclesiæ* and *ex assensu patris* abolished.

15. The act not to extend to gavel-kind, or borough-English, or copyhold lands.

16. The act not to take effect where the husband shall have died or created a charge of dower before the 1st of January, 1833.

NOTES OF THE WEEK.

NOTICES OF MOTIONS IN THE HOUSE OF COMMONS RELATING TO THE LAW.

Mr. *Attorney-General.*—To revise the powers of the commissioners for enquiry into public charities.

Mr. *Sadler.*—Bill for bettering the condition of the labouring poor of England.

Bill for the improvement of the administration of the poor laws.

Sir *Charles Wetherell.*—Resolution, That the establishment of Courts in which barristers, to be approved by the Lord Chancellor or the Keeper of the Great Seal for the time being, are to act as Judges, and to decide on the right to the exercise of the elective franchise, will introduce a principle unknown in the history of the constitution, and highly dangerous to the independency of the House of Commons and the general body of their constituents.

Mr. *Ewart.*—Bill for abolishing the punishment of death, and establishing a milder punishment in cases of sheep-stealing, cattle-stealing, and stealing in dwelling-houses, no person being put in fear therein.

Mr. *Henry Bulwer.*—Petition from New South Wales, praying for trial by jury and a legislative assembly; and to move for a select committee to decide [report] on the fitness of New South Wales for legislative improvement, and the extent to which that improvement should be carried.

ECCLESIASTICAL COURTS.

The *Lord Chancellor* has brought in a bill to amend the practice of these Courts. Up to a late period, the only mode of enforcing obedience to their orders was by *excommunication*. This defect was remedied by a measure introduced by Lord *Stowell*; but the act did not reach *members of parliament*. And as all the Courts of law and equity, though restrained from the arrest of peers and commoners, have power to sequester their property, it is proposed that the Ecclesiastical Courts shall have the same means of compelling obedience.

ENGLISH AND IRISH LAW PROCESS.

Lord *Plunkett* has brought in a bill to extend the process of the English law Courts to Ireland, and that of the Irish Courts to this country. We beg to direct the attention of practitioners to the consideration of this important alteration. We have lately been made acquainted with some difficulties in the enforcement of claims in Ireland by English suitors, that induce us to think the measure of Lord Plunkett will be advantageous, but we have not seen the bill.

HOUSE OF LORDS APPEALS.

The Lord Chancellor now sits from day to day, on appeals in the House of Lords, during the remainder of the session, except on those Saturdays when there are motions to be heard in his private room.

VACATION MOTIONS IN CHANCERY.

The Lord Chancellor has announced, that as long as he remains in town, which must be for some weeks, he will devote one day in every week (*Saturdays*) to hear motions in his private room; the notice of the motion to be sent to him on the Wednesday, that he may arrange respecting his attendance in the House of Lords.

SUPERIOR COURTS.

LORD CHANCELLOR'S COURT.

PRACTICE. — MARKSMAN.

When a competent Court has once dealt with a suit, the decree of such Court is binding until it is reviewed and altered in an appeal. The fact of a person being a marksman does not necessarily prove him to be illiterate.

THE *Lord Chancellor* gave judgment in this case. It was very voluminous as to the pleadings and evidence, and the facts were extremely complicated, although there was no great conflict as to the principles upon which it was to be decided. It had been thought by the Judges who had dealt with it before, to be one of the most melancholy that ever came before a Court of justice. A reputable, numerous, and once wealthy family, and which had for many years consisted of infants, had been kept from 1801 in painful litigation in two suits in the West Indies, and in one in this country. It had been, during that period, impossible to say to whom the rents and profits of the estates belonged. Some of the claimants, after pining in suspense for many years, had died; others had grown up without being able to settle; some of them, mercantile persons, had been unable to say whether they were worth any thing or not. After the two suits in the West Indies, and after an account, which in those suits had been fully taken, that account had been sought to be opened; and in 1812 the litigation, which his Lordship hoped was now about to close, was commenced in this country. In 1817, Sir T. Plumer, then Master of the Rolls, directed an enquiry to be made by the Master. That enquiry having been made in 1824, the same Judge delivered an opinion on the matter. There was a great difference between his former and his latter opinions. In the former, he entertained suspicions that there had been great fraud; in 1824 his object was evidently to allay and remove the effect of those suspicions. Lord Gifford succeeded Sir T. Plumer, and pronounced a very elaborate judgment; and subsequently Sir John Leach pronounced another judgment (this case having then been brought before him), varying Lord Gifford's, and in favour of the plaintiffs. Lord Lyndhurst afterwards heard the cause on appeal in this Court, but did not make a decree before he quitted office. The cause then came before him, and he had heard it ably and most fully argued. This delay of 30 years, and the repetition of the arguments at the Rolls and in this Court, with the other circumstances of the case, had moved him to interpose the least possible further delay in the final decision of this suit. His Lordship had, not only during the arguments, but since, applied his mind to the facts and evidence in the case, which he should now recapitulate, though not in a manner proportioned to the length of the proceedings, yet sufficient to show upon what grounds his opinion was formed. Mr. Peake Fuller was in possession of West India estates, and mortgaged his property to Messrs. Willis and Waterhouse, and at the time executed an agreement to make consignments of the produce of those estates to the mortgagees, who were also to be furnishers of the estate. In this character they not only received, and were entitled to receive, the lawful interest of 6*l.* per cent., but also commission upon the produce assigned to them, and upon the supplies which they furnished, so that it sometimes amounted to 10*l.* or 12*l.* per cent. on the original sum advanced. This fact would run through the whole of his judgment in this case, because, in the absence of direct evidence as to what was done by parties, much depended upon the probability of what would be done in such cases. Peake Fuller died in 1798, leaving his estate settled upon his first son for life, remainder to his other sons and daughters for their lives, with remainder to his eldest son in fee. That son, Henry Augustus Fuller, was of full

age when the testator died. Katharine Lepell Fuller and the other children commenced the suit in the Court of Chancery, in Jamaica, against Willis and Waterhouse, and Mr. Queenborough, the manager appointed by Peake Fuller. The question between the parties was, In what situation did Willis and Waterhouse stand after the death of Fuller down to 1807? With respect to the suit in 1801, the question was, Are the parties concluded by the account taken in that suit, that account being taken on the foot of Willis and Waterhouse being consignees, and not mortgagees in possession? It was clear, in point of law, that when a competent Court dealt with a suit, the decree of such a Court was binding upon the parties and privies to the suit, until it should be reviewed and altered upon appeal. No other Court of a concurrent jurisdiction could question such a decree. This principle was established by frequent and plain decisions, particularly by the opinion delivered by Chief Justice de Grey on the trial of the Duchess of Kingston, and in *Fermor' case*, 3 Co. Rep. 44 a. and *Ken's case*, 7 Co. Rep. 42 b. It being clear, then, that the account of the suit of 1801 must stand, unless impeached on the ground of fraud, and having attended to the circumstances from which fraud had been imputed, his Lordship had come to an opinion that there was not any foundation in fact for the allegation of those circumstances which are said to be the badges of fraud, or to set aside the account which had been taken, or the judgment pronounced in the Jamaica suit as having been fraudulent and fictitious altogether. His Lordship said, with respect to the first suit, he could not lay out of his mind that Mr. Palmer, then a most respectable solicitor in Jamaica, was employed to file that bill on behalf of the Fullers. There was not the shadow of evidence that the eldest son of Mr. Peake Fuller was incapable of managing his affairs. That he appeared to be a marksman in the signature to his will, was no proof that he was illiterate, and could not write, because his incapacity to sign his name might have arisen from illness. Katharine Lepell Fuller was of full age, as it appeared now, when the bill was filed. The Master of the Rolls said it was a badge of fraud that she was stated in the pleadings to be an infant. She came of age in December; the bill was filed in the January following; but how easy was the supposition that the instructions for the bill had been given before she had arrived at full age, although the bill was not filed till afterwards. The Master of the Rolls argued, that as Willis and Waterhouse had joined Queenborough in taking the account, this could only be because Queenborough was their agent. Their interest as consignees was as great, it might be greater, than that of Mr. Fuller, the tenant for life; and there was nothing inconsistent in their recommending the continuation of the agent who had been appointed by the testator in his lifetime. Mr. Powell, the Master in Chancery in Jamaica, was examined as a witness in the cause. He stated he had lived for more than 30 years in Jamaica, and that during 19 years he had acted as Master; that the accounts were regularly, fully, and minutely gone into, in the same manner as all other accounts he had taken in the course of his practice in that office. This was strong evidence in favour of the party relying upon the account so taken. Nothing could be more unlikely, or more inconsistent with their other conduct or with their interest, than that Messrs. Willis and Waterhouse had ever changed their relation to the estates from consignees to that of mortgagees in possession, and there was no fact in evidence from which such a conclusion could be drawn. The reasoning upon which that view had been supported would apply with equal force to any other case of West India charge, because all the circumstances relied on were common to all other cases. Something much more distinct and strong, then, would be necessary, before the Court could go so far as to adopt that conclusion. In 1809, Katharine Fuller, it appeared, was acquainted with the suit, for she had then a copy of the bill and answer; she knew also that she and her brothers and sisters were receiving an allowance under the Master's report, and it was probable that she knew it long before. It was not until 1812 that she proceeded to unsettle the account and disturb the equities established by the decree. In 1812 the allowance which had before been paid ceased. Taking this delay and all the other circumstances into consideration, his Lordship had come to a conclusion which prevented him from agreeing with the decision of the Master of the Rolls, but induced him to concur with that of Lord Gifford. The appeal was therefore allowed, and the former decree of Lord Gifford affirmed. — *Fuller* v. *Willis*. L. C. June 20.

COURT OF KING'S BENCH.

SHERIFF'S LIABILITY. — LACHES.

Where a plaintiff, on account of negotiations between himself and the defendant, delays, for a term, his proceedings against the sheriff, the latter is discharged by the plaintiff's laches.

John Jeffery Williams showed cause against a rule for setting aside an attachment against the sheriff. The process was returnable in Michaelmas term; but the rule for bringing in the body was not served until the first day of Easter term. There was, therefore, some delay in the proceedings of the plaintiff against the sheriff; but that arose from a negotiation having been carried on between the parties. During the pendency of that negotiation, the plaintiff took no steps in the cause. That, however, was no reason for depriving the plaintiff of his remedy against the sheriff. The existence of the negotiation was a sufficient excuse for his supposed *laches*.

Platt contrà. When time is given to the party by negotiating, the sheriff is discharged. *The King* v. *the Sheriff of London*, in *Peacock* v. *Leigh*, 1 Taun. 111. *The King* v. *the Sheriff of Surrey*, in *Brewer* v. *Clarke*, ib. 159. *The King* v. *the Sheriff of Surrey*, 7 T. R. 452.

Taunton J. As I understand the facts of this case, they are these:—The rule for bringing in the body might have been served on the first day of Hilary term, but it was not served until the first day of Easter term; so that, in truth, the

plaintiff permitted the whole of Hilary term to elapse without taking the necessary steps in order to bring the sheriff into contempt. This *laches*, it is said, was caused by a negotiation between the parties. But it strikes me, that if the plaintiff intends to rely on the liability of the sheriff, he is bound to pursue his remedy promptly; but here he has not done so, for reasons with which the sheriff has nothing to do. It does not appear that the sheriff has here suffered any special damage: but, independently of any want of special damage, it appears to me, that the negotiation between the parties being a matter with which the sheriff has nothing to do, and the plaintiff, in consequence, delays his proceedings against the sheriff, he is not entitled to issue an attachment against him. Under the circumstances of this case, where the delay of a whole term has taken place, and nothing has been done by the plaintiff against the sheriff, the present attachment ought not to have been moved. — *The King* v. *the Sheriff of Middlesex*, in *Davies* v. *Allen*. E. T. May 5. 1831.

MINOR CORRESPONDENCE.

LAW INSTITUTION.

To the Editor of the Legal Observer.

SIR,

As the time rapidly approaches for the opening of the Law Institution in Chancery Lane, I cannot longer refrain from calling your attention to a resolution reported to have been adopted by those who have the management of the Institution. It is reported that they have determined no one shall become a subscribing member to that Institution, who is not a member of, or connected with, the legal profession. Surely no such resolution as this can have been come to! It never can be their intention to exclude from their library and their public lectures any young man, whatever may be his trade or profession, who has leisure, and who may wish to avail himself of those channels for the purpose of collecting useful and valuable information.

I take it for granted that the fundamental object of that Institution is the diffusion of useful knowledge, not partially but generally and universally. I also take it for granted that it is founded for the purpose of co-operating with the other literary and scientific Institutions in the metropolis in administering to the intellectual wants of the people. Those Institutions, without one exception, on the payment of a small annual subscription, put forth an universal invitation to their library and their public lectures. Surely, therefore, this Institution, in these respects, will not allow itself to be pointed out as a solitary exception to the general rule.

I hope your kindness will do me the favour to insert this in your excellent publication, to which, though not a lawyer, I have been a constant subscriber, in order that authentic information, through the same channel, might find its way without delay to the public, as well as to your much obliged and obedient servant,

Northampton Square, W. C.
Aug. 25. 1831.

*** We are fully persuaded that the most liberal and considerate attention will be bestowed by the Committee of the Law Institution in framing the rules which relate to the library and lectures; but our correspondent should bear in mind that this Association has been formed by professional men alone, without any aid from the public; and if it should be determined, either on the ground that there is not sufficient accommodation within its walls for more than the members of the profession, or for any other reason, that it should be confined to them, the public can no more complain of being excluded from this, than from any other establishment *peculiar* to its own members; such as the Inns of Court, the colleges of the medical profession, &c. — ED.

MISCELLANEA.

CAUSES OF SUCCESS AT THE BAR.

IT is amusing to read the numerous instances of success at the bar, which are mainly ascribed to the *fortunate accident* of the leader's illness. It seems to be supposed, that but for these uncertain openings, the great men, who from such beginnings have been elevated to the bench and the woolsack, would have remained in obscurity. The proposition is absurd; talent and industry of the first order will make its way, in spite of the absence of such casualties — the reward of a combination of distinguished genius and diligence is not dependent upon chance. Among the stories now in circulation of this kind is the following:—

For three years after Lord Eldon was called to the bar, he was wholly without business. [This is no unusual circumstance, but we had heard that the period of his Lordship's probation was much longer.] His prospects wearing no appearance of amendment, he intended to dispense with the services of his clerk, and was in the act of telling him of the barrenness of his prospects, when they were interrupted by the entrance of an eminent solicitor, who presented a huge brief, on which was written, "Mr. Scott, 40 guineas." It appeared, that the gentleman who was to conduct the cause was seized with a sudden and serious illness, and sent his brief back, with a strong recommendation that the solicitor should employ Mr. Scott. The cause was to be tried the next day. The young barrister sat up all night to read his brief. The subject was one of intricacy and difficulty; but it is said he made a speech of great length and perspicuity, and obtained a verdict. His deserted chambers were soon crowded, and business poured in from all quarters.

The Legal Observer.

VOL. II. SATURDAY, SEPTEMBER 17. 1831. No. XLVII.

> ——— "Quod magis ad nos
> Pertinet, et nescire malum est, agitamus."
> HORAT.

THE COURT OF EXCHEQUER AND ITS JUDGES.

LETTERS OF A HEIDELBERG STUDENT ON THE JURIDICAL INSTITUTIONS OF THE COUNTRY.

LETTER V.

MY DEAREST FRIEND,

THE Court of Exchequer will be the subject of this letter. It is, as I have already mentioned to you, one of the three principal Courts of Common Law; and in some respects possesses powers more extensive and important than the two others which I have already described. It has an equity as well as a common law jurisdiction. This it probably at first acquired to assist its power over all matters concerning the king's revenue, to which it was originally confined. But in the progress of time it was found convenient to extend its powers; and now almost every matter which can engage the other Courts both of common law and equity may be brought before the Court of Exchequer. There was also, until very lately, another impediment to bringing on business in this Court. It was this: the whole body of attorneys could not practise here, as in the other two Courts, but were obliged to employ a limited number of attorneys, who were a sort of peculiar officers of the Court, which increased the expense of a suit in the Exchequer very considerably. This monopoly has, however, been very lately abolished, at the recommendation of the Common Law Commissioners, who, although they chose to continue, as I have mentioned in my last letter, the monopoly of the serjeants, have very properly thrown open the Court of Exchequer. And it must be admitted that the grievance which they have remedied was much more severe and oppressive than that which they have suffered to remain.

There was also another reason which frequently operated to discourage the bringing suits in this Court. It was this: the Judges who have been generally appointed to the bench in this Court have not been first-rate men. This observation does not apply to the Bench as at present constituted, where, as I shall hereafter mention to you, there sit at least two men of the highest eminence in their profession. But I am informed that it has not been always so fortunate. Men have frequently been appointed to the bench in the Exchequer who certainly were not the most fit for the situation. It has been said that every Chancellor, either for political or personal reasons, must make one bad appointment; and it is this Court that has generally had the disadvantage of this infliction. The mixed duties of the Judges have favoured this custom; for the friends of the new appointee could boldly assert that he knew something of one of his many duties. If he knew nothing of law, it might be said that at any rate he knew a great deal of equity; and if he knew nothing of equity, that he was omnipotent in law; and by this sort of *see-saw* laudation a bad appointment has been frequently supported. Its business had greatly declined; and, what is rather whimsical, a fifth judge has lately been added, to assist the other four barons in doing nothing. As, however, a four-baron power was generally considered sufficient to despatch the duties of the Court, it was not immediately discovered why a fifth should be appointed. These various reasons were sufficient to bring this Court into considerable disrepute. I am happy, however, to say, that at the time that I am writing, it is daily recovering from this sort of odium. This is owing in some degree to the throwing the Court open, as I have mentioned, to the whole body

of the profession. A separate bar will soon be formed here, which you will be surprised to learn did not before exist; and which sufficiently shows the small quantity of business that was transacted here. The chief cause, however, of its increasing reputation is doubtless the appointment of eminent persons to the bench, which has at once attracted a considerable quantity of business to the Court, greatly to the assistance of the other Courts, particularly to the Court of King's Bench. Indeed, I am informed that the business is now as great in the Court of Exchequer as in the Court of Common Pleas. I shall briefly describe to you the judges of this Court, who are, as I have mentioned to you, five in number. The chief judge is called the Chief Baron; and the *puisne* judges, Barons.

The Chief Baron has only been appointed some few months. He is a distinguished person in England; and you will remember a familiar name when I tell you that he is — Lord Lyndhurst. You already know, from the attention you have paid to English politics, that he was Lord Chancellor for a considerable period of time, and resigned that office on the accession of the present administration to office. He was not permitted, however, long to remain unoccupied. Negotiations were almost immediately commenced to induce the late Chief Baron to resign; they were at last successful, and Lord Lyndhurst consented to accept the office. High expectations were formed of the manner in which he would discharge its varied duties, and it is only justice to say that they have been in no way disappointed. Intimately acquainted with common law, having passed his whole life in constant practice in those courts; possessed of a considerable knowledge of equity, from his having presided for four years in the Court of Chancery; gifted by nature with great abilities, and blending dignity of manner with affability and good temper; it has rarely happened that a person could be found so qualified to perform the duties of the Lord Chief Baron. His Court is no longer avoided by practitioners; there is now no want of business. No man catches more quickly at the real difficulty of a cause; and this quality enables him easily to despatch his common law business. His statements to the jury are clear and satisfactory; and his judgments on points of law sound and luminous. His great fault as Chancellor was undoubtedly his inattention to business, not to say idleness. He allowed his other occupations to interfere too intimately with his duties as equity Judge. The arrear in his court was not, therefore, much diminished. He was busy and attentive while in court, but out of court he was certainly not so expeditious as he might have been. In his present situation he has no other duties but those of his judicial office to attend to, and the benefits to the public are considerable. There is now no arrear in his court. I am assured that before he left town for his circuit he had disposed of all the business in his court, both in equity and at common law. It is generally supposed that, if the Chief Justiceship of England were to become vacant, and no political purpose were to be served, it would be offered to Lord Lyndhurst; and probably few appointments would give more general satisfaction.

Mr. Baron Bayley is the senior *puisne* baron. He has been now twenty years a Judge in the King's Bench and this court. As a Judge, few can be found his equals. His knowledge of law, pleading, and practice is very great, and superior to that of any other *puisne* Judge on the bench. In knowledge of practice he exceeds Lord Tenterden. In forming a comparison between him and the last-mentioned noble personage, one might say, that Lord Tenterden was a Judge who decided by principle, while Baron Bayley decided by precedent. The former has more vigour and boldness in his views of cases than the latter. The latter, has, however, great advantages over the former, in his knowledge of precedents, and his unwearied readiness in their application. Few Judges have had their decisions at *nisi prius* so seldom reversed. In his mode of leaving a case to the jury, he is clear and correct. Indeed, it has been a matter of great surprise that the great abilities of this eminent Judge have not ensured his promotion to a higher office. His faculties are still vigorous, and hardly impaired by his long and active life.

Baron Garrow is the next *puisne* baron. He is not remarked for his knowledge of law pleading or practice. He is, however, admired by all for his eloquence and acuteness in cross-examination. While at the bar he was considered one of the ablest advocates of his time. His language is particularly correct and elegant. His increasing deafness will, it is feared, soon deprive the public of his valuable services.

Baron Vaughan is a moderately good lawyer; but much cannot be said in favour of his talents as a Judge. While Serjeant

Vaughan, he was regarded as a good advocate and a tolerable speaker.

Baron Bolland is a good crown lawyer, and well acquainted with the poor law; but in other respects I understand he is considered deficient in the requisite qualifications of a Judge. He is, however, a learned antiquarian and a finished scholar.

I must now once more bid you adieu. The Courts are now all closing for the long vacation as it is called. All the common law Judges have for some time been on their circuits. I intend to join a friend on one of these; and it is not improbable it will furnish me sufficient materials for another letter.

Ever believe me,

* * * *

REVIEW.

A General Treatise on Statutes: their Rules of Construction, and the proper Boundaries of Legislation and Judicial Interpretation. Including a Summary of the Practice of Parliament, and the Ancient and Modern Method of Proceeding in passing Bills of every Kind. With an Appendix of Precedents, Forms, Rules, and Orders. Part the First: Parliamentary. Part the Second: Legal. By Fortunatus Dwarris, of the Middle Temple, Esq., Barrister-at-Law. London: Saunders and Benning. 1831.

We consider this to be one of the most learned and interesting works that for a long time has issued from the legal press. Mr. Charles Butler had stated in his Reminiscences, that "he considered no work could be more useful than one which should show where interpretation should stop and legislation begin;" and Mr. Dwarris has here undertaken to perform the task. "A *readable* book upon such subjects," says our author, "is not often practical — a practical work is very seldom readable:

'Omne tulit punctum, qui miscuit utile dulci.'

To produce both is here attempted." The style of Mr. Dwarris, and his evident enthusiasm as a writer, entitle him to expect a favourable judgment on the result of his labours. The first and larger part of the work was published in 1830, and is chiefly occupied with the subject of Parliamentary Practice. The second part has very recently made its appearance, and consists mainly of that which the "learned reminiscent" had considered a *desideratum*. To the general reader this second volume will be more interesting than the first; but we consider that the other is not without its claims on our attention, independently of the practical information it communicates.

The object of Mr. Dwarris has been to describe the origin and progress of the Statute Law of England, and the method of making laws. He has also added a summary of the Practice in Parliament, the forms and proceedings of each assembly, and the various ceremonies used between the respective branches of the legislature. In the course of the work he has introduced, besides the sessional forms and the routine of business, the peculiar laws and customs of parliament, in order to assist the constitutional student, and to put the young member of the House into possession of its several forms.

It is to this part of Mr. Dwarris's labours that we intend at present to direct our attention; but we hope to advert fully, at an early period, to the second part of the work, which is devoted to an examination of Acts of Parliament in their regular analytical course, the consideration of their rules of construction, and the proper boundaries of legislation and of judicial interpretation. Mr. Dwarris intimates, that prior to his work, nothing solid or systematic upon the subject had been attempted; for the meagre and imperfect sketch prefixed to the first volume of Burn's Justice, consisting only of a few detached maxims and unconnected particulars, could scarcely be regarded in that light.

It is one of the purposes of that portion of the work to which our observations must be confined, to bring down to the latest possible period the regulations affecting private bills, of which no very methodical account has yet appeared, but which are constantly undergoing new and extensive changes and modifications. This department of the Treatise is professedly practical; but it is interspersed with references and disquisitions which cannot fail to attract the attention of the legal and parliamentary enquirer; though we are aware that some of our busy and much occupied friends may deem these matters as so many interruptions to their more profitable avocations.

The author, in the execution of his design, has followed the plan recommended by Bacon—not to set down the rules alone, "like short dark oracles, which every one will admit to be true, but in the mean time they give little light or direction;" but to furnish both rules and exceptions, with a clear and perspicuous exposition—"breaking them into cases — opening them with distinctions — showing the reasons where-

upon they depend, and the affinity they have to other rules."

We must limit our extracts, for the present, to that part of the work which relates to the origin and progress of the Statute Law; not because the other portions are of inferior importance, but our limits prevent us from doing justice to more than the sections we shall select, and which, we trust, will be sufficiently interesting to our readers to justify the space we have afforded.

The manner in which this part of the author's plan has been executed will afford sufficient evidence of the general merits of the work; and we make our quotations from the preliminary chapter of the first volume, both on account of the general interest which it is calculated to excite, and the example it affords of the spirit of enquiry applied to the subjects of the second volume.

In commencing our analysis of the work, we may first notice, that the statutes passed before the beginning of the reign of Richard the First (the time of legal memory) are distinguished from those made since. Such of the former as have not been repealed or altered, are considered, by professional writers, as part of the *leges non scriptæ*. They are, as it were, incorporated into, and become a part of, the common law; and of this kind, according to Sir Matthew Hale*, is a very great portion of what we now receive for the common law.

Anterior to the date of the earliest statutes now extant, the general name for all laws was *assisæ*, or sometimes *constitutiones*. The enacting power was always expressed as subsisting in the king — *rex præcepit vel constituit.*

All petitions were directed to the king himself, or to the king's council, or to the king and his council. This council of the king consisted of privy councillors, ministers of state, the judges, and Attorney-general, and when called together upon matters of importance, *in pleno consilio*, included also the Master of the Rolls, and other persons of great prudence and ability, who might be convened.[a] This was the *consilium ordinarium* which is generally mentioned in Acts of Parliament, under the name of *consilium regis*, or *coram rege et concilio*. But sometimes the prelates and lords, or such of them as were in attendance[b], or at hand, were joined in deliberation with the *consilium ordinarium*, and then it was called *magnum consilium*. Sometimes, too, the knights and citizens were called in to the *magnum consilium*, when it was held ancillary to, or in preparation for, a Parliament. But it may be usefully remarked, that writs of summonses to great councils never ran *ad faciendum* (to enact), but *ad tractandum, consulendum et consentiendum* only.[c] The use of the term *magnum consilium*, however, is very indiscriminate. Sometimes it means only the Upper House (the Lords' House in Parliament), sometimes the Lords' House joined with the *consilium ordinarium*, and sometimes the whole body of Parliament.[d] *Commune consilium* always imports both Houses of Parliament. But anciently, as has been stated, all petitions were directed to the king, or *al roy et son conseil*, or *al conseil le roy*, till the middle of the reign of Richard II. when the same were directed "*al roy et al noble seigneurs assembles en Parlement;*" which latter title became ordinary and habitual in the time of Henry IV., and so downward.

To return, however, to the earlier periods of our juridical history. It was soon felt to be too much that the king should make, or even alter laws, of his own mere pleasure, and to suit his private purposes.[e] This would, indeed, be first disputed in the case of such alterations as affected the persons or property of the barons. Accordingly, there seems reason to believe, that originally the business of providing, as well as declaring laws, was principally left in the hands of the king, unless in instances where the Lords or Commons felt an interest in promoting a law, or the king anticipated an advantage in procuring their concurrence.[f] Upon such occasions, a *commune consilium* was summoned, the advice of the *magnates* required, and the law expressed to have been passed "with their consent," or "at their request and prayer." Not that in this country (as Fortescue hath nobly testified, and in a work addressed to a prince[g],) the mere arbitrary will of the monarch ever constituted the law; but, what need not create much surprise, the limits of the executive and legislative authority were not in any, the slightest degree, defined or understood. The right of general legislation was placed in the king with the advice of his great council. So little opposition was found in these assemblies by the Norman kings, that they were fortunately led to gratify their own love of pomp, as well as the pride of the barons, by consulting them in every important business.[h] But the limits of the legislative power were extremely indefinite. In the great council, or parliament, (the student will remember they are not properly synonymous,) a general scheme of future laws,—the principle, perhaps, in part, the

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* Hist. C. Law, 4.

[a] Hale's Juris. of the Lords.

[b] At Verneuil, in 1176, a mixed assembly of English and French enacted laws for both countries; some English barons, in all probability, being over on service with the king in France. At Northampton, in 1165, several Norman barons voted, and no notice was taken of this proceeding as an irregularity.

[c] Prynne's Register.

[d] Hale's Juris. of the Lords.

[e] 1 Reeves' Hist. Eng. Law, 85.

[f] Ibid. 217.

[g] Fortescue *De laudibus legum Angliæ*, c. 54, 55, 56.

[h] Hallam's View of the State of Europe during the Middle Ages, vol. ii. c. 8.

plan, on which they were to be afterwards framed, was indistinctly laid down; the rest was left to the executive to complete, and even to vary, in the manner *it* found expedient. To these modifications the consent of the other branches of the legislature was virtual, tacit, implied; in the other case (when they assembled) it was real, explicit, and express.

Such legislative acts as the king assumed to perform himself, without calling in the assistance of his great council (and which must have been supposed to be only a furtherance of justice, in conformity with established law), and such resolutions of the great council (composed upon important occasions, not only of those who were regularly summoned to the House of Lords, but of deputies from counties, cities, and boroughs, and therefore hardly distinguishable from parliament, except in name) as established temporary or partial regulations, however confounded in common parlance, or by the vulgar and indiscriminate use of terms, were, in legal apprehension, quite distinct from Acts of Parliament or statutes of the realm. Such were properly ordinances[i]: appointments proceeding from the king, or the king and the Lords, without the concurrence of the Commons; or, where they occasionally denote the act of the whole assembly, being then determinations of conventions or councils, and not Acts of Parliament.[j] A remarkable instance occurs in the great council held 27 Ed. 3. which consisted of one knight from each county, and of deputies from all the cities and boroughs; and at which the ordinances of the staple were established.[k] In the last petition of that council, the Commons pray — "because many articles touching the state of the king and common profit of his kingdom, have been agreed by him, the prelates, Lords and Commons of his land at this council, that the said articles may be recited at the next Parliament, and entered upon the roll, for this cause; — *that ordinances and agreements made in council are not of record, as if they had been made in a general Parliament.*"[l] This accordingly was done at the ensuing Parliament, when these ordinances were expressly confirmed and directed to be "holden for a statute to endure always." Sir Matthew Hale, speaking of this transaction, says: "But this *magnum consilium* had nothing of legislative power and jurisdiction, and therefore they were afterwards enacted, to supply the defect of a law."

The author then describes the distinction between patents, charters, and statutes, and proceeds to the origin of Parliaments. After observing that under the form of diets, states general, &c., Parliaments universally prevailed in all nations of Teutonic original, the author notices those in England, under the titles of *wittenagemote*, or meeting of wise men; *commune consilium regis*, &c. These were frequently held, as the affairs of the kingdom required, from the earliest times of the Heptarchy, during the dynasties of the Saxons and Danes, to the Norman conquest.

After that event, there is some authority and equal reason to believe that they were occasionally, though less frequently, convened, and only on pressing emergencies, by the Norman line; as "when the Conqueror," if we may rely upon Hoveden, "caused twelve persons, skilled in the customs of England, to be chosen from each county, who were sworn to inform him rightly of their laws; and these, so ascertained, were ratified by consent of the great council[m];" which Sir Matthew Hale asserts to be as sufficient and effectual a Parliament as ever was held in England (which is true in substance, though the term Parliament is of more recent use): and, as "the *totius regni adunatio*, held at Rockingham, in the reign of William Rufus, when, as may be collected from Eadmer, 'a certain knight came forth and stood before the people, and spake[n] in the name and behalf of them all, whereby the mind and consent of the people was understood:' till in the reign of Henry III. writs were unquestionably issued to summon knights, citizens, and burgesses to Parliament."[o] These deputies of boroughs, who before 49 Hen. 3. were only occasionally and specially convened, in order to grant subsidies, and vote supplies, were finally and permanently engrafted upon Parliament, by Edward I.[p]; but

[i] 3 Reeves' Hist. Eng. Law, 146.

[j] *i. e.* of the *magnum consilium*, and not of the *commune consilium*.

[k] Hallam's Middle Ages, vol. ii. c. 8.

[l] Rot. Parl. 253. 257.

[m] Sir M. Hale's Hist. of Com. Law. Prynne's Animad. 32.

[n] As Speaker of the Great Council, Hakewill supposes.

[o] The earliest writs of summons to cities and boroughs of which we can prove the existence, are of 49 Hen. 3. "After a long controversy, almost all judicial enquirers seem to have acquiesced in this origin of popular representation."— *Hallam.* The following observations of the same writer are perfectly just. "To grant money was the main object of their meeting; and if the exigencies of the administration could have been relieved without subsidies, the citizens and burgesses might still have sat at home, and obeyed the laws which a council of prelates and barons enacted for their government. But it is a difficult question, whether the power of the purse drew after it immediately, or by degrees, those indispensable rights of consenting to laws, which they now possess."

[p] According to Ruffhead (*Pref. Edit. Stat.*), the first regular precept directed to the sheriff for the election of citizens and burgesses, of which we have authentic memorial, is 21 Ed. 1. There are writs for the election of knights, 11 Ed. 1. (1 *Parl. Hist.* 87.) Besides the difference from the writs of 49 Hen. 3. of being sent to the sheriff of the county, instead of going to the cities and boroughs, the writ 22 Ed. 1. had the remarkable introduction, "That which concerns all should be approved by all, and common dangers should be provided against, by means furnished by all." The statute *de Tallagio*, &c.,

it is still questionable whether they gave, for some time, any thing more than a constructive assent to the laws enacted. The writ in 22 Ed. 1. directs two knights to be chosen, "cum plenâ potestate pro se et totâ communitate comitatûs prædicti ad consulendum et consentiendum pro se et communitate illâ, hjis, quæ comites, barones et proceres prædicti concorditer ordinaverint in præmissis[q];" which implies that *these* representatives of the Commons were to bear their part in deliberation: but these knights of shires correspond to the lower nobility of other feudal countries, and had originally belonged to the same branch of Parliament as the barons.

[*To be continued next week.*]

NEW BILLS IN PARLIAMENT.

TENANT BY THE CURTESY.

Analysis of a Bill for the Amendment of the Law relating to the Estate of a Tenant by the Curtesy of England.

1. ACTUAL seisin shall not be necessary to give a title as tenant by the curtesy, provided the land be recovered in the time during which such right of entry may be enforced.

2. The husband shall be tenant by the curtesy, notwithstanding there may have been no issue born alive, in case he would have been entitled to such estate if he had had such issue.

3. Where there shall be issue of a former marriage, the estate by the curtesy shall extend to only one moiety of the hereditaments, and the other moiety shall descend immediately after the decease of the wife to her heir or issue entitled thereto.

4. The act not to extend to gavelkind or borough-English, or copyhold hereditaments.

5. The act not to take effect where the wife shall die before the 1st of January, 1833.

PRACTICAL POINTS OF GENERAL INTEREST.

No. VII.

THE RIGHT OF A DISSENTING MINISTER TO HIS CHAPEL.

THE following case, which is abridged from *Doe* d. *Jones* v. *Jones*, 10 B. & C. 718., shows the exact right which a dissenting minister has to his chapel. See also *Doe* d. *Nicholl and others* v. *M'Kaeg*, 10 B. & C. 721.

This was an action of ejectment brought to recover a chapel and dwelling house. By lease and release of the 5th August, 1783, *J. K.* and *L. R.* bargained, sold, and assigned over to Benjamin Jones, and nine other persons therein named, and to their heirs and assigns, a piece of land therein particularly described, and the structure and meeting-house thereon erected and built, to have and to hold the same, with their and every of their appurtenances, to the said Benjamin Jones, and the nine other persons therein mentioned, and their successors, ministers of the respective meeting-houses or places therein mentioned for the time being, for ever, in trust, and to the intent and purpose that the said structure or building should be used as a meeting-house or place for public or religious worship by the society or private congregation of protestant dissenters called Presbyterians; and that they should permit and suffer the same from time to time to be used, occupied, and enjoyed, as and for a meeting-house, place, or house for such public and religious worship by such society or congregation of protestant dissenters, and to or for no other use, intent, or purpose whatsoever. It further appeared that the defendant, Michael Jones, had been, according to the usual practice, elected by the congregation minister of the chapel sixteen years ago, and was then put into possession of the house and premises by the officers acting under the authority of the trustees. At a meeting of the congregation in the year 1828, it was determined by a large majority that the minister should be changed; but no other minister was elected. Possession of the chapel, dwelling-house, and premises, was demanded of the defendant Michael Jones, on behalf of the trustees, but he refused to go out. Benjamin Jones was the last surviving trustee of those named in the deed, and his grandson of the same name was his heir-at-law, and lessor of the plaintiff. On this evidence it was contended, that the lessor of the plaintiff could not recover possession of these premises against the defendant so long as he continued minister of the chapel. By the very deed under which the lessor of the plaintiff claimed, the trustees held it in trust to permit and suffer it to be used as a place of religious worship. The defendant was duly elected to fill the office of minister of the chapel, and had an office coupled with an interest, and continues to hold

attributed to the 25 Ed. 1., bound the king not to impose taxes without the aid of the Commons in Parliament assembled, and thereby secured their convocation. "The convention of such an assembly in Parliament whenever the Crown wanted aid from the people, thenceforth became a necessary measure, and a measure to which the resort unavoidably became frequent, in consequence of the increasing necessity of the Crown for extraordinary aid from various causes." See *Lords' Committee on the Dignity of a Peer*, and see the Westminster Review, No. 16. Art. 1.

[q] Hallam's Middle Ages, vol. ii. c. 8.

such office until another minister has been duly elected according to the usual course adopted on former occasions.

Raine C. J. was of opinion, that the legal estate was in Benjamin Jones. The heir at law of the last surviving trustee mentioned in the deed; and directed the jury to find a verdict for the plaintiff, but reserved liberty to the defendant to move to enter a nonsuit.

Campbell now moved accordingly. The trustees cannot recover in ejectment against the present defendant, so long as he continues minister; and he having been duly elected continues minister until another has been appointed by the congregation. The proper course would have been for the congregation to have elected another minister; and then the Court by *mandamus* would have compelled the defendant to give him possession of the chapel, &c. So long as the defendant continues in his office of minister, he has a possessory right to the house. In *Rex* v. *Baker*, 3 Burr. 1265., Lord Mansfield says, speaking of such a case as the present, "The deed is the foundation or endowment of the partnership. The form of the instrument is necessarily by way of trust; for the meeting-house, and the land upon which it stands, could not be limited to Enty (the minister) and his successors. Many lectureships, and other offices are endowed by trust deeds. The right to the function is the substance, and draws after it every thing else as appurtenant thereto. The power of the trustees is merely in the nature of an authority to admit. The use of the meeting-house and pulpit in this case follows, by necessary consequence, the right to the function of minister, preacher, or pastor, as much as the insignia do the office of a mayor, or the custody of the books that of the town-clerk."

Parke J. The *mandamus* was to admit the party elected to the use of the pulpit as pastor, minister, or preacher. That is, like an easement, a right of common or of way. In this case the defendant has no interest in the premises except that of a tenant at will, and that has been put an end to by the demand of possession. The trustees had a right to the chapel. It is possible the defendant may have a remedy against them in equity, if they have improperly turned him out.

Lord *Tenterden* C. J. For the reasons given by my brother Parke, I think it perfectly clear that the legal estate in the premises was in the lessor of the plaintiff.

Rule refused.

MEDICAL JURISPRUDENCE.

No. V.

INSANITY (*continued*) — LUCID INTERVALS. — WILLS SET ASIDE FOR IMPROPER INFLUENCE.

PROFESSOR AMOS, in his Lecture at the London University, part of which we inserted in No. 43., p. 245., *antè*, next proceeded to the subject of *lucid intervals*, in relation to questions on the validity of wills and testaments; and observed that the principal judicial authority was the judgment of Sir W. Wynne.*

"If you can establish that the party afflicted habitually by a malady of the mind has intermissions, and if there was an intermission of the disorder at the time of the act, that being proved is sufficient, and the general habitual insanity will not affect it; but the effect of it is this — it inverts the order of proof and of presumption, for, until proof of habitual insanity is made, the presumption is that the party agent, like all human creatures, was rational; but where an habitual insanity in the mind of the person who does the act is established, there the party who would take advantage of the fact of an interval of reason must prove it. That is the law; so that in all these cases the question is whether, admitting habitual insanity, there was a lucid interval or not to do the act. Now, I think the strongest and best proof that can arise as to a lucid interval, *is that which arises from the act itself:* that I look upon as the thing to be first examined; and if it can be proved and established that it is a rational act rationally done, the whole case is proved. What can you do more to establish the act? Because, suppose you are able to show that the party did that which appears to be a rational act, and it is his own act entirely, nothing is left to presumption in order to prove a lucid interval. Here is a rational act rationally done. In my apprehension, where you are able completely to establish that, the law does not require you to go further, and the citation from Swinburne does state it to be so. . . . Unquestionably there must be a complete and absolute proof that the party who had so formed it did it without any assistance. If the fact be so, that he has done as rational an act as can be, without any assistance from another person, what there is more to be proved I don't know, unless the gentleman could prove, by any authority of law, what the length of the lucid interval is to be—whether an hour, a day, or a month. I know no such law as that; all that is wanting is that it should be of sufficient length to do the rational act intended. I look upon it, if you are able to establish the fact that the act done is perfectly proper, and that the party who is alleged to have done it was free from the disorder at the time, that is completely sufficient." — 1 *Phillimore*, 100.

* Medical Gazette, for 16th July, 487.

The Professor then continued as follows:

Lord *Thurlow* has observed, that the evidence in support of the allegation of a lucid interval, after proof of derangement at any particular period, should be as strong and as demonstrative of such a fact as where the object of the proof is to establish derangement. Perhaps it would be more just to observe, that if, on the one side, derangement has been clearly proved, a lucid interval must also be clearly and satisfactorily proved on the other side. But there appears to be no reason for requiring, in the proof of each of these several facts, precisely the same measure of evidence or the same degree of demonstration. It is possible that both facts may be most satisfactorily established, though the proof in the one case, may perhaps, not be so strong or so demonstrative as in the other. The proof of insanity is frequently obvious, and often easy; but the existence of a lucid interval — the question of restoration to light and reason — is generally one of the greatest difficulty.

Neither can it be necessary to show, that the patient has been restored to as perfect a state of mind as that which he had before his derangement; because, as Lord *Eldon* has observed, the strongest mind may be reduced by the delirium of a fever, or some other cause, to a very inferior degree of capacity; — a great intellect may lose half its powers, and still retain more reason than falls to the lot of the common order of minds, and all that the law requires is a disposing mind, capable of doing an act of thought and judgment.

Still, perhaps, there is a more important difference than Sir W. Wynne is willing to allow, between a reasonable act and an *interval*, which is a *state*, the duration of which should, perhaps, be sufficiently long to admit of a judgment of its reality. It is observed in the pleadings of the great French lawyer, D'Agusseau, that an act of reason may subsist with a habit of madness. He says, a lucid interval must not be a superficial tranquillity, a shadow of repose; but, on the contrary, a profound tranquillity, a *real* repose. It must not be a mere ray of reason, which only makes its absence more apparent when it is gone; — not a flash of lightning, which pierces through the darkness, only to render it more gloomy and dismal; — but a perfect light, a lively and continued lustre, a full and entire day, interposed between the two separate nights of the fury which precede and follow. It must not be a diminution of the complaint, but a kind of temporary cure; — an intermission so clearly marked, as in every respect to resemble the restoration of health. Not only must the individual act be in itself rational, but the agent must be shown not to labour under delusion on any other point whatever.

These views of D'Agusseau, founded on the doctrines of the civil law, are consonant to the views of many eminent medical authorities. This part of the subject (said the Professor) I will leave to my colleague, citing only a short passage on the subject from the writings of Dr. Willis: —

"Many imagine that when a patient can converse quietly and rationally upon general subjects, he is a sane man; hence, this state is sometimes denominated a 'lucid interval.' No man however, can be considered sane, until he freely and voluntarily confesses his delusions. Every physician acquainted with the disorder, knows that a patient may be capable of conversing correctly upon many subjects, and even of restraining himself for a time from alluding to that upon which his delusion turns; if, however, this particular subject be accidentally brought to his attention, he will give evident proofs of his derangement. This state is not, therefore, properly an interval of sanity; for, though we see the patient capable of being clear and lucid on many subjects, still finding him at the same time lost and bewildered on one, he cannot, with any propriety, be deemed in his senses, or of sound mind. This fact, moreover, explains why the experienced physician will never certify to the sanity of any individual, without having frequently examined him in new situations, and under different circumstances; while the inexperienced, through his ignorance of the complaint, often does it, in confirmed cases of madness, because the patient is capable of saying the Lord's prayer, repeating the multiplication table, or playing a game of whist." *

I have dwelt longer upon the nature of lucid intervals, because I do not find that the judicial authorities are quite agreed upon the subject; and I conceive that in whatever future legal investigations may arise, concerning a "lucid interval," the opinions of the medical world will have great weight in fixing the common law of the country.

Swinburne mentions a case in which a man being *in extremis*, an abbot asked him if he would leave such a manor to his abbey? "Yes." — Then such a house; such a field: "Yes, yes." Upon which, the heir at law being out of patience, said, "Is not this a very rogue and knave?" To which the testator answered, "Yes, yes."

Mr. Amos, from this instance of the influence which was exerted in former times over the dying, adverted to the question, "whether influence and importunity, *short of violence and menace*, when exerted to procure a will in favour of a particular person, will avoid the will." Referring to the case of *Ingram* v. *Wyatt* †, the Lecturer illustrated that part of his subject with the following case in which he was personally engaged, and in which the jury set aside the will.

Doe on the demise of Eley v. *Gould and others.* — Thomas Eley was a young man, just come of age. He possessed property — was at variance with his family — and bequeathed all he was worth to one Mosley, a lace-manufacturer, to whom he was apprenticed. The testator removed to Mosley's house on Thursday, 29th May, 1823, and made his will on the Saturday (31st); he was then in a declining state of health, and died on the Wednesday following.

* On Mental Derangement, p. 151.

† 1 Hag. 2d Ser. 400. 450.

John Bowman examined. — I was at Mosley's house before Eley died; used to attend him and give him his medicine; he took medicine several times; had every thing he wanted; I was not directed to deny him any thing; never heard any complaint from Eley that he *was under restraint;* very great friendship; can't think he had any fears of Mosley; was an apprentice there; was at Mrs. Bainbridge's; saw her during that time occasionally at dinner; came about ten days before Eley's death; he was on the first floor; Mosley occupied the room above; was *in a very pleasant room;* after Eley came he slept in the first bed, I and Colton in the other — the third was empty; *Mosley's treatment to him was like that of a father to a son;* he neglected work a little in order to attend to him; sat up part of the time; Eley was subject to violent perspiration; ordered his shirt to be shifted; had linen several times a day.

Cross-examined. — Slept every night he was there; when he came he looked very ill; very weak in body, *not in mind;* not rambling, not till the latter part of his life; he might be, a couple of nights before his death; he asked for rum and water; I gave him half a glass; Mrs. Mosley gave me the rum and water. One night he told me to fetch a man out of the cupboard; don't know whether it was the night before, or the night but one before his death; he sang "God save the king," and made many noises; *not sober when he died;* did not see any thing given him; gave him some rum and water seven or eight hours before his death; *in my opinion he died in intoxication;* I did not know about either will; Mosley would not have him disturbed, and therefore would not let Spencer see him; I read the Bible; Eley did not wish to hear me read it.

Elizabeth Bainbridge examined. — I knew Thomas Eley; he came to lodge with me on Shrove Tuesday, six years ago; he objected to lodging at Mosley's; had a flock-bed, and was among the apprentices; when he first came he was in tolerably good health, but went a journey with Mosley and caught cold; never recovered from that cold; Mr. Higginbotham attended him at my house; he might have attended him nine or ten times; remember Eley's going to Mosley, Thursday, May 29th; Mr. H. saw him about half an hour before he left; I was there when Mr. H. came; Eley was up stairs in bed when Mr. H. saw him, about a quarter past twelve; Mosley talked a little with Mr. H.; Mr. H. came down stairs; I asked what he thought of Eley; he said, impossible to get better; went up stairs to Eley — asked him if Mr. H. said any thing particular to him; he said Mr. H. had told him he might go on with the same medicines; I said he is flattering you — Mr. H. has told me you are not likely to recover; he seemed to hesitate; I said, there is something to do of great importance — first, to prepare for another world, and next, to fix your property on your brother and sister; he said that with regard to his property he had done nothing — he did not think he should; the property came to him by heirship, and should go by heirship; he said as long as he kept his hands from pen and ink, nothing would be amiss on any side. After I came down, the servant-maid of Mr. Mosley assisted him to get up; he came down about one o'clock; before he went out he said, "Mrs. B. I am going to dine at Mr. Mosley's; I shall probably come in to tea. Get the sofa and put it in a corner; that will do nicely — better than up stairs." He told me he should give directions for his brother and sister to be sent for, to assist me in doing for him at nights; went away; a person came from Mosley's about five o'clock for his night-clothes and a couple of lemons; I thought it very strange Mr. Eley did not come back, for Mr. Mosley had promised that if not able to walk he should come back in a chair; went to Mosley's on Friday for the purpose of seeing Eley; Mosley refused me seeing him, saying he had desired he should not be disturbed; told Mosley what Eley had said about sending for his brother and sister; he said he had written for them; they were expected every day; wrote for them to come that morning. Went the following day; still refused; called on Sunday; not permitted to see him; I did not stay long, I was going to church; called on Monday; saw Mosley on Monday afternoon; told me he should not admit me; I could not see him; I asked how he was; told me he was getting better — rallying very fast, and coming down to his tea; said Mr. Eley should come again to me when he was better; urged Mosley to let me see him; my heart misgave me; had a great deal to do to get to see him; Mosley and his wife were below; went up stairs along with them; on returning the second time I first saw Mrs. Mosley; told her I was resolved to see him; I said, I shall suppose you are doing something to him you ought not; then went up stairs along with Mr. and Mrs. Mosley; when I got into the room, astonished to see how Eley lay; he was in bed; his eyes were glazed; he was in a dying state; appeared to want to speak with me; I was shocked, and Mrs. Mosley took me into the parlour; she said, Why so pressing? Wished to settle while Eley was alive; Mosley said, make the account out, and be it what it would, he would pay; asking Mosley about his brother and sister, Mosley said he was surprised they did not come; daily and hourly expected; in a poor state when he left my house; was getting worse by degrees; had lodged from Shrove Tuesday to the 29th May; understanding and memory far from perfect — not as perfect as when I first came. Before the 29th May had conversation about his property; he said when he had got possession he should build; I heard him say, as soon as he could form a fresh connection he should leave; heard him say, Mr. Mosley frequently wished to cut off the entail, but had not done it yet; said Mosley was frequently teasing him.

Mr. Higginbotham examined. — I was called in by Mosley's directions; saw Eley on 9th May, 1823, with Mosley; saw him on horseback; Dr. Hall prescribed for him; visited him first at Mrs. Bainbridge's; visited him seven or eight times — several times at Mrs. Bainbridge's, and after he left Mrs. Bainbridge's can speak to one visit at Mosley's; his disease was pulmonary consumption; he died in *an early stage* of it; had fever at Mosley's; recollect Mrs. Bainbridge; have

some impression as to a conversation with Mosley; don't think there was much difference in the situation between Mrs. B.'s house and Mosley's; Mosley's was warmer—this was better for pulmonary complaints; his room at Mosley's south-south-west, at Mrs. Bainbridge's it was north-east; aspect much better; the weather was warm. I have no recollection of fever, excepting the day before he died, when he had much heat: Dr. Hall is living in London; did not particularly notice Eley's intellects; there was nothing that showed him incapable of managing his affairs, except at a short time before his death; I did not see that he was under any restraint; no recollection that Mosley was always by when I visited him; this is the book that contained his prescriptions.

Cross-examined.—Had fever at Mosley's; suppose he must have had it also at Mrs. Bainbridge's; one day I saw him very flushed; last, or last but one, flushed and comatose; might arise from the disease, so near death; did not know of his taking spirits at that period of the disease; immaterial what he took; he might take what he liked; never visited him before the 27th; medicine sent before occasionally; suppose I attended on the 27th because he was worse; no recollection of desiring Mrs. Bainbridge should not see him; no reason why she should not see him; don't recollect seeing Mrs. Bainbridge after he removed on the 29th; don't recollect saying that he was in a dying state; do not recollect that he was in a dying state before his removal; very likely; no prospect of recovery when I first visited; he died in an early state of the disease.

Dr. Manson examined.—I am a physician; attended in many pulmonary complaints; a patient in that complaint retains his faculties more than in most complaints; they generally lose their faculties a few hours, a day, or two, or three, before death; if he had been in a high state of delirium should have applied remedies to the head; I should suppose from the prescriptions that the patient had a low state of fever.

John Attenburrow.—When delirium occurs in consumption, it is generally *in articulo mortis*, and seldom, or perhaps never, occurs while the patient can stand.*

The report of the medical evidence in this case is very imperfect, but it is sufficient to show what are the kind of questions asked of a medical witness, in a legal enquiry of the nature described.

ON THE DUTIES AND CHARACTER OF ATTORNEYS, AND THEIR EMOLUMENTS.

In all offices of responsibility and trust, whether under the Crown or elsewhere, we usually find that a salary or remuneration is given in proportion to the weight of that trust. This rule appears to be adopted for two reasons: 1st, That holding a situation in which he is accountable, he is, both in policy and justice, paid according to the liability of the property to destruction or robbery, during the period that it is submitted to his protection; 2dly, That filling an office of trust, it is the chief concern of his employers to prevent their trustee betraying the confidence reposed in him; for this purpose, it is wisely considered that there is nothing so effectual as allowing such a liberal salary as will keep him above temptation.

Now among all the classes of trustees, where can we find any upon whom devolves so much responsibility, so much anxiety in fulfilling their arduous duties with fidelity to their employers, and credit to themselves, as upon solicitors? And surely, if there exist an analogy between those official situations to which I have just alluded, and the duties of an attorney, and, of course, an equal necessity for the faithful discharge of those duties, are not the same motives to stimulate them to honesty equally applicable? Are they not all subject to like influences, and liable to be overcome by similar temptations, as other members of the community? If so, why are not the same means adopted to preserve integrity and a proper execution of their onerous and troublesome offices? I venture to predict, that unless legal practitioners are better rewarded for their incalculable labours, and continued anxiety of mind, the public (the *cestui que* trusts) will be sufferers. Why should it be expected that men in the legal profession will trouble themselves to undertake, for little or nothing, the performance of a duty which, in all other situations, is so amply remunerated? I do not assert that men of strict integrity and honourable principles (such as at present are abundantly found in the profession) will stoop to act a wilful and fraudulent part in the regular discharge of their business; but they will not labour for nothing; for, having no motive to remain, they will retire with disgust from a service, the only one in which the labourer is not thought worthy of his hire, and where the toiling ox is muzzled while treading out the corn.

The consequence will readily be anticipated: the duty of the legal practitioner must, from its very nature, still involve in it a trust of heavy responsibility; all, or the greater number, of the respectable part of the profession will have abandoned their former pursuit; it will soon become overstocked with men void of every upright principle, who will enter the law, not for the inducements which the law itself allows, since the little that may

* From the MS. trial in Mr. Amos's possession.

be gleaned therefrom will be inadequate to their wants; but by filling situations in which it must frequently happen that large sums and property have to pass through their hands, they will not scruple to repay themselves for their trouble by every fraud and artifice which the base and cunning practitioner will not be long in discovering. Can it be supposed that men of this character will undertake, for a trifling recompence, to discharge with integrity those important offices which an honest man refuses as offering too little profit for his pains? No! It is contrary to reason and common experience to imagine such a thing.

The name of attorney will, with good cause, become an epithet of reproach; the profession will be overrun by a set of graceless practitioners, pillaging their clients without remorse; whilst the latter, instead of realising the pretended advantages promised by the law reformers of the present age, will become a prey to the rapacity of debased and despicable adventurers. The faithful dogs that have hitherto been the guardians of the public interest, will be exchanged for destroying wolves, whose only aim will be to make what advantage they can of their misguided clients. The Courts will be ashamed to own this new race of miscreants. The object will be entirely defeated, of Lord Mansfield, who acknowledged the legitimate right of the respectable attorney to his protection; and who, "to keep out the vermin," as he expressed it, imposed the heavy stamp duty upon articles of clerkship. If there must be a reform, (and I am not one to question the propriety of simplifying the practice, and diminishing the expenses of litigation,) why not strike at the very root of the mischief, and ease the suitor, by ceasing to draw from his pocket that which is only applied to support the indolent sinecurist? Do not affect to ease the client, by cutting off the hard-earned reward of the industrious solicitor.

Nothing can be so unjust and impolitic as the present mode adopted by the reformers, the evils of which may soon be discovered by any candid and impartial observer: but no sooner is the subject of legal retrenchment brought forward, than all eyes are directed towards the laborious practitioner. The cry is, "Look at an attorney's bill—how enormous! It is time to effect some alterations." To such persons I would answer, that the bill is indeed very heavy; but take the trouble to analyse the charges, deduct that which is paid into the public offices, and it will then be perceived that very little is left for the attorney, who has already advanced from his own pocket these public burdens, with, very frequently, a poor chance of ever regaining them from his employer. It is the interest of the sinecurists to direct the attention of the ignorant client to his solicitor as the cause of all the expenses, in order to ward off the just odium from themselves. This is, indeed, a time when the legislature is called upon most seriously to interfere and protect the labouring part of the profession. Wherefore are solicitors required by government to pay those heavy duties from which all other trades or professions are exempt? If they who are at the helm of affairs, are determined that the profession shall continue to be burdened with them, is it unreasonable that its members should be allowed a fair remuneration in proportion? Do they enforce integrity and industry as essential qualifications belonging to an attorney? let them show some inducement to act accordingly. In many instances men may behave with integrity, without any other reward than the approval of their own conscience: but, without some adequate return, few will be found to enter a profession for the sake of exercising their moral virtues only; when these very qualifications may elsewhere meet their due reward.

G. G.

OBSERVATIONS ON THE POOR LAWS.

To the Editor of the Legal Observer.

Sir,

Before the destruction of monasteries, the poor were under the protection of the church, and afterwards committed to parish officers; and the very excellent principle established by the statute of Elizabeth for their food, clothing, and employment, was only defeated by the mode adopted for enforcing it. The principle was national, the practice parochial; limiting the burden to a mere parochial fund, and the foundation of the evils which followed. These have rendered the machinery so very complex, that very few, even of attorneys themselves, understand the subject.

The number of the legal decisions of the superior Courts upon settlement cases from the quarter sessions, form a code of laws as bewildering and confounding to the judgment as ingenuity could suggest.

This statute, in the same breath in which it announced a great national principle, crippled and bound it in swaddling clothes, by declaring that every parish should maintain its own poor; for questions arising as to who were to be con-

sidered the poor of the parish, several acts afterwards passed to determine them.

To enter into a detail would be tedious; but from the multiplicity of statutes and decisions, the settlement of the poor now depends upon ten distinct general heads, birth, apprenticeship, certificate, estate, hiring and service, marriage, office, purchase, rating, and renting a tenement. Funds, destined to the relief of the languid and distressed, have been dissipated in attempting to remove the burden of maintenance from limits in which the unhappy wanderer sought shelter.

For more than two centuries have the poor been driven up and down, often afflicted with disease and infirmity, to the imminent danger of life.

Let us imagine a poor woman just delivered of a child, deserted by her husband, and cast upon the parish, waiting for the doctor's certificate of her being sufficiently recovered to be removed to a distant settlement in an inclement season. Upon such occasions, Mr. Editor, an appeal to the passions may be fairly allowed, for it is only by arousing the feelings, we hope to ameliorate the condition of the poor.

National protection is not confined to locality, nor can the pauper receive a better or a cheaper maintenance, by transporting him to a place of settlement nearly 200 miles.

If the desire for reform be sincere, we must not affect alarm at novelty in practice, convinced by experience of the utter insufficiency of particular systems; to suffer them to remain, is shutting our eyes against the light, and sinning against conviction. To ameliorate what is false is a vain attempt; radical defects may be removed, but never admit of improvement. Many laws have passed, and as many thousands pursuing the same plan would be equally fruitless. What is the cause of the removal? The answer is, to get rid of the burden. Then let the fund be national, and instantly vanish parish removals, certificates, and settlement cases, with all the miserable train of endless litigation; of questions of no other importance than as the poor man's natural liberty is abridged, and to encourage a practice which obstructs labour, and is consequently at once an injury to the state, and an aggravation of distress.

Treating the poor as the children of a particular district, is a petty expedient; and this, forsooth, because it was the place where their parents were born, or casually resided.

Is not the king entitled to their allegiance, as members of the state; and are they, on account of poverty, to be excluded from the ordinary pale of protection, and to be imprisoned within their own parish? The enjoyment of natural liberty, not incompatible with public safety, might be allowed as their consolation. Their country should be their settlement, the nation their guardians.

In order to economy, the plan should be simple and universal; under the fostering hand of national protection, the poor would feel that they have a home to fight for, a country to defend. This grand object accomplished, the vessel of state, although on a dangerous sea, in a tempest, may yet brave the storm.

Trusting that these observations, or rather suggestions, will meet with your concurrence,

I remain, Sir,

Your obedient servant,

August 30, 1831. H. B. A.

*** We trust that this important suggestion of our Correspondent will be taken into consideration on the intended application of the Poor Laws to Ireland, as well as on a revision of the English system. The principle of raising a *general* in lieu of a *local* fund has been adopted in the instances of the Metropolitan Turnpike Roads and the New Police. If these are found to be advantageous, the plan should be extended.

DISPUTED DECISION.

TENANT FROM YEAR TO YEAR.— RENT.

I HAVE perused the observations of your correspondent F. A., in p. 216., and also the query of H. H., contained in No. 44. p. 272., upon the recent decision of *Brown* v. *Chandler*, as reported at p. 106., but I cannot entirely agree with their views of the case, though the Chancellor's decision seems, in one respect, erroneous.

From the report in your work (I have seen no other) it appears that the tenancy was only from year to year, no mention being made of any leases either from the tenant for life, or any previous owner of the property.

Now the language of the act of parliament, 11 Geo. 2. c. 19. § 15., seems only to have reference to cases in which an actual lease had been made by the tenant for life; for the provision therein contained is to have effect "where the tenant for life shall happen to die before or on the day on which any rent was reserved upon any *demise* or *lease* of any lands, &c. which determined on the death of such tenant for life." Unless, therefore, a yearly tenancy be comprehended under the term "*demise*," I humbly conceive that the case of *Brown* v. *Chandler* is not within the statute.

Supposing, however, that the respondent was not entitled to the proportion of rent in dispute, I cannot understand why the remainder-man should be entitled to it, inasmuch as it accrued before his possession; nor is it clear to me how the circumstances of the tenancy having existed prior to the estate of the tenant for life can make any difference in the case.

G. H. T.

SUPERIOR COURTS.

LORD CHANCELLOR'S COURT.

AMENDMENT. — PRACTICE.

Where exceptions to an answer have been allowed, the bill may be amended without notice, as the 13th order does not apply.

THIS was an application to discharge an order made by the Vice-Chancellor, giving the plaintiff leave to amend his bill, on the ground that such order had been obtained without notice to the opposite party. The rule of practice in this

case was laid down in the 15th of the new orders; and that order not appearing to have received a uniform construction, the *Lord Chancellor* said that he had looked into it, and had also communicated with the other Judges in equity. This was a case in which, if the Court were to be influenced by the facts only, it would be inclined to give the plaintiff as full an opportunity of amending as he desired; because it appeared that the defendant, who admitted certain dealings connected with the object of the suit, denied that he had any books relating to those dealings. The bill had been twice before amended, and those amendments the defendant had not objected to. The second answer had been excepted to by the plaintiff, and the exceptions in part allowed. The 13th order applied, as to the restriction which it imposed, to cases in which the answer was held to be sufficient. Here, as the exceptions were allowed, the answer ought not to be called an answer at all, and therefore he thought the rule did not apply. An exception, it appeared, had always been made as to amending without notice for clerical errors; and it would be well to consider whether such cases should not be provided for by a separate order. His Lordship, therefore, dismissed the application in this case with costs. — *Bird* v. *Hustler*. L. C. June 13.

NEW TRIAL.

Where a new trial will not be granted.

Sir *E. Sugden*, Mr. *Pollock*, Mr. *Starkie*, and Mr. *Blackburn* were heard in support of a motion for the new trial of an issue directed in this case by the Court.

The *Lord Chancellor*, without hearing the counsel on the other side, said he was of opinion that this was not a case in which a new trial should be had. The whole of the facts had been most fully before the jury who had tried the issue. The Judge before whom it was tried had been of opinion that the verdict was right upon the evidence as it was adduced, although he might have suspected that there was other evidence in existence. As it could not, however, be satisfactorily ascertained that there was any other evidence; and as, if the verdict had been the other way, there would have been no ground for granting a new trial; he did not think there ought to be any further trial for the reasons now alleged. The Crown did not think fit to produce the will, nor was it incumbent on them to do so. They declined offering that proof, in order to save themselves from a reply; and they had a right to do so, if they thought fit. One of the jury had, it appeared, been acquainted with the contents of the will; but the jury had been charged by the Judge not to let that fact, or any others not in evidence, influence their finding. The non-production of the will was, therefore, tantamount to there being no will at all. As to the observations which had been made by counsel on the trial, or the weight which those observations might have had upon the jury, if such a ground were to be relied upon for granting a new trial, no verdict could stand; even the observations of a Judge, however unfounded, would not induce the Court to grant a new trial, unless there was a palpable misdirection by the Judge. His Lordship said he directed the issue, in order that the claim of the Crown might be fully investigated, and that no undue prejudice might exist in its favour. The result of the trial had been such as to answer the end for which it had been resorted to; and he therefore rejected the application, the verdict being, as it appeared, perfectly satisfactory. — *Attorney-General* v. *Monckton*. L. C. June 13.

ISSUE. — WILL. — INCOMPETENCE.

In the trial of an issue out of Chancery, as to the validity of a will, it is not always necessary to examine all the witnesses who attested it.

What evidence will be insufficient to establish a general incompetency to make a will.

The *Lord Chief Justice* of the Court of Common Pleas delivered the judgment in this case, which had been heard before the Lord Chancellor, assisted by the Lord Chief Justice and the Lord Chief Baron. The question was, whether a new trial should be granted, or an issue directed by the Court of Chancery, to try whether the late Mr. Marsden, of Hornby Castle, was of sound mind at the time he made a will, by which he bequeathed his estates to the plaintiff. The first ground relied upon in support of the motion for a new trial had been, that all the witnesses in whose presence the will had been executed had not been examined at the trial; and the second point was, that the verdict was not consistent with the evidence, and therefore not satisfactory to the Court by which it had been directed. Upon the first point, the Court was of opinion that it was not necessary that all the three witnesses should have been examined on the trial. With respect to the second point, the Court considered, that under the circumstances of this case, the verdict of the jury was as satisfactory as those circumstances made it possible. The defendant had, in the first instance, insisted that upon the trial there was no evidence of general incompetency on the part of Mr. Marsden; and that he was not in such a state of mind as that any will made by him could be a valid disposition of his property, to the exclusion of his heir at law: and as a second branch of this part of the case, the defendant contended that the testator was a person easily influenced by the authority of persons who were about him; that such authority was so exercised in this instance, as to amount to coercion; and that the will, being executed while he was in such a state, could not be supported. The Court was of opinion that there was no sufficient evidence of fraud or coercion on the part of Mr. Wright, and were therefore not disposed to attach any importance to that part of the argument. The general incompetency of the party was the only remaining ground with which the Court had to deal; and first, and chiefly, they had to consider whether that point had been fully and properly considered by the jury. Sixty-one witnesses were examined, whose evidence extended over various parts of the testator's life up to his decease. The testimony of these witnesses was very con-

fleeting; some of them considering his intellectual capacity not above that of a child, and others representing him as a man possessing a retentive memory, of ordinary capacity, and as perfectly competent to manage his affairs. In this conflict of evidence, the Court were spared the trouble of now detailing minutely its various bearings, because there were certain collateral facts in the case which mainly influenced the opinion they were about to pronounce, and these facts might be divided into three classes. The first consisted of his correspondence with various persons; the second, of his acts and conduct on several occasions; and the third, of the circumstances attending the preparation and execution of the will. The letters had been said to have been written under the influence and by the dictation of Wright; but this assertion remained without any proof. In the absence of such proof, the Court could not presume fraud or undue influence: and there was one circumstance which directly negatived such a presumption; this was, that some of the letters were written to Wright at a time when the testator was far away from him. Then, with respect to the acts performed by the testator, he had executed twenty-three deeds, between 1782 and 1819; and some of these were of a very important kind; one of them being a mortgage of his estate for 27,000*l.*, the others of a nature in which the interests of other parties were involved, and who would hardly have been content to deal with him, if there had been any suspicion that he was not competent to the management of his affairs. The deeds were some of them prepared, and most of them attested, by respectable solicitors, and by other indifferent persons; and their attention would naturally be drawn to the circumstance of the testator's state of mind. It could not, therefore, be expected that such solicitors would rashly shipwreck their clients' interests by dealing with a man who could not be bound by his acts. The will of the testator had been prepared by Mr. Bleasden, a gentleman of great skill in his profession, and who had at this time retired from practice, though he had formerly been Mr. Marsden's solicitor. He had, before, made three other wills for him, the instructions for which were given by the testator, and some of them were in his own handwriting. This gentleman had not been cross examined on the trial, though, if there were any suspicion that he had been a party to collusion of any kind, he might have been questioned as to his conduct. Considering the weight and bearing of those three heads of collateral evidence upon the case, the Court was of opinion that a new trial ought not to be granted. The special jury before whom the trial was had, displayed unwearied patience; the evidence had been most fully and carefully summed up by the learned Judge who tried it; and it could not, therefore, be doubted that the result was satisfactory. The Court, however, thought, that the party making the motion ought not to be visited with costs.

The *Lord Chancellor* said, that this cause had been heard, by consent of the parties, before the two learned Judges who had assisted him. He had given no opinion, and should give none; the judgment, therefore, was in form his, in substance that of the other learned Judges; his former position as counsel in the cause precluding him from giving any opinion as to its merits. — *Tatham* v. *Wright*. L. C. June 10.

COURT OF KING'S BENCH.

AWARD. — STAMP.

A paper writing, having the force of an award, though not the form, must be stamped as such.

Assumpsit. An account had been delivered and balance struck, for which this action was brought. The plaintiff offered in evidence a paper containing different sums, under which there was written the following memorandum: — "The above sums, against which the word '*admitted*' is written, were this day allowed in our presence.

(Signed) "R. C. RYDER."
(and by another arbitrator.)

Campbell objected to this paper being received in evidence, on the ground that it was equivalent to an award, and was not stamped as such.

Lord *Tenterden* C. J. I rather think this might have the force of an award, and therefore it cannot be received. — *Boyle* v. *Perkins*. Ni. Pri. E. T. 1830.

INTERLOCUTORY COSTS. — SET-OFF.

Interlocutory costs in a prosecution may be set off against each other.

This was an indictment for perjury. The defendant had carried down the record for trial, but had not proceeded to trial, upon which the prosecutor had obtained an order for the allowance of his costs. The record had been subsequently taken down by the prosecutor; and he not having proceeded to trial, a like order was obtained by the defendant *Archbold* had obtained a rule to show cause why the costs of the defendant should not be deducted out of those to be paid by him to the prosecutor.

Curwood was about to show cause, when

Lord *Tenterden* asked if there was any instance of setting off interlocutory costs.

Archbold replied that there was; that the usual practice had been to set off one judgment against another, subject to the attorney's *lien;* and cited *Howell* v. *Harding*, 8 East, 362., which was an application similar to the present, to deduct costs for not proceeding to trial, from the amount of the verdict ultimately recovered, and the application was opposed by the attorneys, who claimed a lien on the costs. But the Court agreed "that the attorneys' lien only attached upon the balance of the costs accruing in the same cause, which were ultimately to be paid over to the one or other party in that cause; and that the cause was not to be split so as to give the attorneys of either party a lien upon interlocutory costs, although ultimately his client should be bound to pay costs to a greater amount to the adverse party."

The Court held this authority to be decisive, and made the rule absolute. — *Rex* v. *Burke*. T. T. June, 1830.

DEMURRER:—PLEADING.

Although it appears on the face of a declaration, that less is due than is alleged, the pleading is good.

Demurrer to a declaration. The declaration was in debt on a mortgage deed, dated April 19. 1825, to secure the repayment of 1000*l.* with interest, on the 29th of October following. The declaration set out the deed, and averred that there was "now due and owing for principal and interest, &c. the sum of 2000*l.* whereby an action hath accrued to the said plaintiffs as aforesaid, to demand and have of and from the said defendant, the said sum of 2000*l.* above demanded."

Campbell, in support of the demurrer, contended that this was bad. That it appeared on the face of the declaration, that no more than 1025*l.* could be due; but if the plaintiff should recover on the declaration as it stood, he must recover 2000*l.*

Bayley J. He may recover less than the sum demanded.

Campbell. If the plaintiff were to declare in debt on simple contract, showing a demand for 40*l.*, and then averred, "whereby an action hath accrued to the said plaintiff, to demand and have of and from the said defendant, the sum of 50*l.* above demanded," it would be bad. He must show a title to what he demands, or it is a ground of special demurrer.

Per Curiam. The Court may give judgment for less than the sum demanded. The case of *M'Quillin* v. *Cox*, 1 H. Bl. 249., is an express authority that the plaintiff may recover a less sum than is stated to be due.

Judgment for the plaintiff.* — *Anonymous.* T. T. June 23. 1830.

ANSWERS TO QUERIES.

NEGLECT OF TRUST. P. 287.

1. In answer to this query, I beg to say that the decisions in cases like the present depend much on the facts of the case. From the statements here made, I am of opinion that the surviving trustee would be held liable to make good the trust moneys misapplied by *A.*, as the law would presume he had given a tacit assent to such misapplication, and had not exercised that prudence and caution which is required of trustees, notwithstanding the clause contained in the deed that the one party should not be answerable for the other; and the Court will never allow the benefit of this clause to a trustee, when common care might have prevented a loss which has arisen through the misconduct of his co-trustee. C. C.

2. Where two trustees *both act*, it is usual for the *one* to take the trouble and burden of the execution of trusts upon himself; and for *both* to sign all documents. In other words, the *business-man* takes the responsibility on his own shoulders, all of whose acts are stamped with the approbation of his coadjutor.

I am inclined to think that *B.* is liable on the score of a want of *vigilance*. He ought to have exercised more caution: although *passive*, he still acted by signing, and cannot take advantage of his own wrong, and extricate himself from his embarrassing situation to the detriment of the *cestui que* trust. *Indolence*, too, and not a lack of *capacity*, might have been the reason of his assuming the character of a *sleeping partner*; and if so, *B.* must submit to its effect. The transactions generally under the trust were *joint and not separate*, and therefore I entertain the opinion, that *B.* cannot screen himself under the operation of the clause referred to. Mr. Preston says, in his Essay on Uses and Trusts (3d edition, vol. i. p. 300.), "Where there are two or more trustees, the rule is, that each of them shall be charged for his own wilful neglect, default, or breach of trust only; and that the innocent trustee shall not suffer for the misconduct of his co-trustee. *Therefore*, it has been decided that a trustee who has joined in a voucher for the whole trust-money, but has in truth only received a part of it, shall be charged for so much only as has actually come to his hands:* *unless*, indeed, fraud, or, what is tantamount to it, gross negligence, should appear in the transaction. A.

3. *B.* has undoubtedly made himself liable for the whole amount of the rents and profits which remained unaccounted for up to the time of *A.*'s death, and likewise for the balance of the purchase money.

The clause in the deed, "that each shall be answerable only for his own acts, receipts, and defaults," &c. will be of no avail to *B.* in the present case; nor does it in any case bind the trustees as a covenant, but is merely a clause of indemnity to remove responsibility. *Vide* case of *Bartlett* v. *Hodgson*, M. T. 1785. K. B. 1 T. R. 42.

The rule that trustees are not liable for losses occasioned by the misconduct of their co-trustees does not extend to cases where it has been through their own default, or negligence, that their co-trustees have unnecessarily been invested with the power which has enabled them to occasion the loss. As a trustee is answerable for misapplication of the trust fund by his co-trustee when it has been occasioned by the needless confidence which he has reposed in him, he will also be liable for misconduct of his co-trustee which has been connived at by him (as it was by *B.* in the present instance), although he has derived no advantage from it. H. B. A.

FILIATION.—BANKRUPT. P. 287.

1. It is quite clear that the obligor is absolved from the bond after he becomes a bankrupt; *vide* 7 Geo. 1. c. 31., whereby it is enacted, that all and every person or persons who now are, or shall hereafter become bankrupts, shall be discharged of and from all bonds, notes, or securities whatsoever.

The parish can prove for the arrears up to

* Vide *Aylett* v. *Lowe*, 2 W. Bla. Rep. 1221.

* *Leigh* v. *Barry*, 3 Atk. 584., No. 2. t. Bridgm. 30. *Keble* v. *Thompson*, 3 Bro. 112. Also, *Lord Shipbrook* v. *Lord Hinchinbrook* 11 Ves. 252. 16 Ves. 477. S. C.

the date of the commission, and are entitled to a proportionable part of the bankrupt's estate, in proportion to the other creditors; *vide* 6 Geo. 4. c. 16. § 51., which enacts, "that any person who shall have given credit to the bankrupt upon valuable consideration, for any money or other matter or thing whatsoever which shall not have become payable when such bankrupt committed an act of bankruptcy, and whether such credit shall have been given upon any bill, bond, note, or other negotiable security, or not, shall be entitled to prove such debt, bill, bond, note, or other security, as if the same were payable presently, and receive dividends equally with the other creditors." H. B. A.

ERRATUM. — P. 287. column 2. line 2. For *mortgagor's* read *mortgagee's* solicitor.

QUERIES.

ATTORNEY'S SIGNED BILL.

WILL proof of having put a letter into the General Post Office *here*, to be forwarded to a client in a British settlement in North America, viz. Prince Edward's Island, containing a signed bill of costs for conducting an appeal case before the Lords of his Majesty's privy council in *England*, be a sufficient compliance with the statute of 22 Geo. 2. c. 22. § 3., which requires a delivery to the party to be charged; and is a Judge of the *colonial* Court, in an action brought therein for the recovery of such bill, bound to receive such proof as evidence of the fact of a delivery to the party?

Is it requisite that bills in appeal cases should be taxed before delivery; and cannot an action be maintained without such taxation having taken place? G. G.

CHANCEL. — SURPLICE FEES.

A lay impropriator of a prebendal estate, upon his wife's decease, caused her to be buried in the chancel of the church, his family having from time to time been buried therein *without fee*. The present vicar, however, on the burial, refused to inter the corpse without being paid the sum of two guineas (much more than the usual surplice fees), which sum was paid him. The impropriator is a non-resident of the parish, and was so at the time of his wife's decease. As the chancel, it is presumed, belongs to the lay impropriator (he being subject to its repair), is he not entitled to bury his family therein, whether they die residents of the parish or not, without payment of any other fee than the usual surplice fees?

Bristol, Aug. 25. 1831.

MISCELLANEA.

SIR THOMAS MORE, UNDERSHERIFF OF LONDON.

The following is extracted from the Records of the City of London relating to the Appointment of Sir Thomas More to be Undersheriff of London, and some Appointments of his immediate Predecessors and of his Successor

(27th September. A. D. 1496.)

"Commune consilium tentum die Martij Vicesimo Septimo die Septembr' Anno Regni Regis Henr' Septimi duo decimo.

"In isto Comūn Consilio Thomas Sall et Thomas Marowe confirmati sunt in Subvic Civitati: Londoñ p anno sequent, &c."

(1497.)

"Comūne Consiliū tent' die Lune xxv^to^ die Sept' anno Regni Reg^is^ Henr' vii. xiij^o^.

"Isto die Thomas Marowe et Ed^a^ Dudley confirmat' sunt in Sub Vic' Cit^a^ London p anno seqū."

(1498 & 1501.)

Similar entries of the confirmation of Thomas Marowe and Edward Dudley are made in the 14th, 15th, 16th, and 17th Henry VII., and at a court of aldermen, held on the

(1502.)

17th Nov. 18 Henry 7. the following entry appears:—

"Ad hanc Cur' Thomas Marowe uñs sub vice comitū sponte resignat officñ suū."

And at a Common Council held on the same day, is entered —

"In isto Communi Consilio Radūs adye Gentilman elect' est in unū Subvic' Civitats London loco Thoñe Marwe Gentilman qui illud officiū sponte resignavit, capiend' feod' consuet'."

"Cōs Consiliū tent die Martis iij^o^ die Septembris anno Regni Reg^e^ Henrici Octavi Secundo.

"Eodñ die Thoñs More Gent elect' est in unū Subvic' Civitats London loc' Ric' Broke Gent qui nup elect' fuit in Recordator Londoñ."

"Martis viij die Maii 6^th^ Henry 8.
"Court of Aldermen.

"Yt ys agreed that Thomas More Gent con of Undersheryfes of London which shall go ov' the Kings Ambasset in to flaunders shall occupie his Rowme and office by his sufficient Depute untyll his cūmyng home ageyn"

"Martis xj die Marcii 7 Henry VIII^th^
"Court of Aldermen.

"Ye shall sweare that ye shall kepe the Secrets of this Courte and not to disclose eny thing ther spoken for the coēn welthe of this citie that myght hurt eny psone or brother of the seyd courte onles yt be spoken to his brothr or to other which in his conscience and discrecon shall thynk yt to be for the coēn welthe of this citie. So help you God."

"Jovis xiij die Marcii 7 Henry 8.
"Court of Aldermen.

"Itm ad ista Cur' Thomas More and Willm Shelley Subvice^es^ Cit^s^ London jur' sunt ad articlm supdcm spect xj die marcii."

"Veñis 23 July, 10 Henry 8.
"Court of Aldermen.

"Ad istam Cur' Thomas More Gent un Subvic' Cit^s^ in Compuf' Pulletr London libe' et sponte Surr' et resigñ officm pdcm in manu' Maioris et Aldrōr."

"Coie Consiliu tenf' die Venis xxiij die Julii anno regni regis Henrici Octavi decimo."

"Isto die Johes Pakyngton Gent admissus est in unu' subvic' Civitats London loco Thome More qui spont et libe' resignavit Officiu' illud in Man' Maioris aldrōr et Cōis consilii. Et jur est &c." — *Lardner's Cyclopædia*, British Statesmen, Vol. I. p. 108.

The Legal Observer.

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> ——— "Quod magis ad nos
> Pertinet, et nescire malum est, agitamus."
> HORAT.

THE EFFECT OF THE LORD CHANCELLOR'S DESPATCH OF BUSINESS ON THE PECUNIARY INTERESTS OF PRACTITIONERS.

THE speech of the Lord Chancellor on closing his sittings in Lincoln's Inn appears, by the several reports in the public papers, to have been delivered with considerable exultation at the nature and result of his labours. It appears that on several occasions his Lordship sat from 9 in the morning till past midnight, and for about a fortnight till 10 or 11 at night.

The duration of the sittings, however, did not exceed more than two days the period devoted by Lord *Eldon*; neither were the evening sittings unprecedented in the annals of judicial industry. Lord *Hardwicke* used to return in the evening at 6 and sit till 12, and on one or two occasions he remained till 4 in the morning. Lord *Lyndhurst*, also, with marvellous patience, listened to one of the suitors in person from an early hour in the day till a late hour the next morning. The Judges at *Nisi Prius* in town, and more frequently on the circuit, are unwearied in the discharge of their arduous duties. They often commence at 8 in the morning, and, when requisite, continue in Court, with the exception of a short adjournment, till midnight.

We do not know, therefore, that, on the one hand, the present Chancellor should be blamed for harassing the profession by his protracted sittings, nor very excessively praised for the accustomed sacrifice of private ease to the performance of public duty. After all, the true question is, not the rapid disposal of causes, but the just and satisfactory decision of them. Too great delay may, indeed, in some cases, be more injurious than an erroneous judgment; but the time and money consumed in correcting a mistake by appeal or re-hearing, are evils not to be overlooked in the estimate of the advantages and disadvantages of the "high-pressure speed" now introduced into the progress of a Chancery suit.

It cannot be wondered at, however, that his Lordship should take occasion to express his great satisfaction that he had been able to dispose of all the arrears of the business of the Court, and to publish the striking fact, "that there were no appeals undisposed of, — no petitions unanswered, — and no causes unheard, except such as were not ready, and which had been put upon the files of the Court subsequent to last June." When contrasted with the complaints which the public have been long accustomed to hear, of interminable arrears, this announcement was too gratifying to be withheld. It appears, according to the statement we have seen, that "the appeals which had been disposed of within a few months, have been 120: of these, 108 have been fully argued and decided; indeed, all of them, except one, which stands for the opinion of the two Judges who assisted at the hearing."

All this looks well; and though some of our venerable brethren shake their heads, and doubt the benefit of such rapidity of movement, we incline to think that the members of the profession ought not to find fault with the course either of this rapid administration of justice, or of the march of law reform. If the suitors be satisfied, let not the practitioners complain.

It appears, indeed, to be supposed, not only by a large part of the public, but by some members of the profession, that the Chancellor's rapidity of proceeding will diminish the amount of remuneration afforded to the practitioners of the Court. This we venture to pronounce a very gross mistake, for, although the sum total of each individual cause may be decreased,

there can be no doubt that the aggregate amount to be received by the practitioner will be increased. This will be effected in two ways. First, by the certainty that the number of cases will be greater; and, secondly, by the advantage of the prompt payment of the costs of proceeding.

It must be within the personal experience of almost every individual, that many cases are never brought forward, on account of the delay and expense of Courts of equity; and it cannot be denied, that in both these respects there is much to amend: at the same time it must be apparent, that these evils are much exaggerated, and, in the majority of instances, they exist only to a limited extent. Persons are averse from enforcing their claims, or resisting those which are made upon them, on account of the alarm they entertain of the ruinous expense and the harassing nature of a suit in Chancery. Let but this impression be removed from the public mind,—whether true to the letter, as some suppose, or grossly magnified, as others contend,—and the Courts of justice will no longer be shunned like an infected land, rather than resort to which the sufferer would prefer to endure a total shipwreck of his best hopes and dearest interests.

It were needless to remind our brethren, that those who are engaged in numerous cases, and for various classes of persons, are necessarily subjected to long delays in the settlement of their fees and disbursements. It is well known, that, in some instances, although the means of ultimate remuneration are certain, the amount, when received, does not exceed two per cent. for the money advanced; and what shall we say to those cases in which principal and interest and labour are all lost entirely?

We believe, therefore, that the celerity of legal proceedings will be beneficial to the practitioner; and when, along with these efforts of the Judges to despatch business, we extend our view over the wide field of new laws and new modes of administering justice, springing up every session of parliament, we think that those who entertain any apprehension of injury to their pecuniary interests, may rest assured that such apprehensions are altogether groundless. Whatever temporary disadvantage may arise from some of the measures of Law Reform, we are persuaded that, when the whole shall come into general operation, the profession will have no reason to complain.* We believe, that, if there be any very general objection to the projected alterations on the part of the members of the profession, it arises rather from that *aversion to change*, which belongs to all established bodies of men, than to mere sordid notions of pecuniary loss. There is a natural dislike to be subjected again, as it were, to the dominion of "the schoolmaster," and to undergo the drudgery of learning many new things in the place of those with which we are familiarly acquainted; and this sufficiently accounts for the indications of any degree of dissent on the part of the profession, without imputing an undue attention to personal interest.

On this subject, however, we would remark, that men who are constantly engaged, either in contending for property which is *not* possessed by their clients, or defending that which *is* possessed, and who, the stronger they seem to feel the interests of the suitor, are the more approved, may naturally be supposed to acquire some relish for those good things about which all the rest of mankind seem so eager to contend. It would not be wonderful, under such circumstances, if they set some little value on worldly possessions. Considering the examples which are exhibited by their clients, — who, if there be any cause of complaint, are the only persons entitled to complain, — they might not unsuccessfully justify some small degree of attention to the rewards of professional skill and diligence.

At all events it cannot but be favourable to the ends of justice, that as soon as a cause is ripe for hearing, there should be no delay on the part of the Court in proceeding to its decision. In this view, we subscribe to the sentiments of the Lord Chancellor, that "it is a very great relief to the Court — it will be a very great relief to the bar — it will be a very great relief to all professional men, as it will be a very great relief to the suitors — to feel that they shall have their business henceforward regularly going on, not encumbered by arrears, and not having their minds oppressed with the harassing prospect of never getting through their business." We are quite sure that the true interest of every branch of the profession will be advanced by having thus disposed of the accumulation of business, and that the prospective arrangements regarding the several Courts to prevent delay and un-

* The Third Report of the Common Law Commissioners (just published in an Appendix to this work), will, in several particulars, confirm the truth of this observation.

necessary expense, will eminently tend, as his Lordship observes, to "raise the character of the Courts of justice in this country, and to answer the arguments so frequently levelled against the legal profession at large;" and that "the profession will feel not only their comfort and peace increased, but their character exalted."

NEW BILLS IN PARLIAMENT.

LIMITATION OF REAL ACTIONS.

Analysis of a Bill for the Limitation of Actions and Suits relating to Real Property, and for simplifying the Remedies for trying the Rights thereto.

1. THAT the word "Land" shall extend to manors, messuages, and all other corporeal hereditaments whatsoever, and also tithes (other than tithes belonging to a spiritual or eleemosynary corporation sole). "Rent" shall extend to all services and suits for which a distress may be made, and to all annuities and periodical sums of money charged upon or payable out of any land (except moduses or compositions belonging to a spiritual or eleemosynary corporation sole). "Person" shall extend to a body politic, corporate or collegiate, and to a class of creditors or other persons; and every word importing the singular number only, shall extend to several persons or things, and every word importing the masculine gender only, shall extend to a female as well as a male.

2. That after December 31. 1832, no land or rent to be recovered but within *twenty* years after the right of action accrued to the claimant, or some person whose estate he claims.

3. The right shall be deemed to have accrued; in the case of an estate formerly in possession, from the *time of dispossession*; in the case of a claim on the death of the person last in possession, from the *time of such death*; in case of alienation, from the *time the claimant became entitled*; in case of future estates, from the time such estate became an *interest in possession*; in case of forfeiture or condition, from the *time it accrued*.

4. Where advantage of a *forfeiture*, or breach of condition, shall not be taken by a remainderman, he shall have a new right when his estate becomes an *estate in possession*.

5. Reversioner to have a new right, on the interest becoming an estate in possession, notwithstanding the claimant shall have been in receipt of the profits.

6. An administrator to claim as if he obtained the estate without any interval between the death of the deceased and the letters of administration.

7. No person to have a new right after possession or receipt of rents as tenant at will, or by sufferance: Provided, that no mortgagor or cestuique trust shall be deemed to be a tenant at will to his mortgagee or trustee.

8. No person, after possession or receipt of rent as tenant from year to year, to have any right but from the end of the first year, or last payment of rent: and no such right shall be deemed to have first accrued upon the determination of such tenancy.

9. Where rent, amounting to 20*s.* reserved by lease in writing, shall have been wrongfully received, no right to accrue on the determination of the lease.

10. A mere entry not to be deemed possession.

11. No right to be preserved by continual claim.

12. Possession of one coparcener, &c. not to be deemed the possession of the others.

13. Possession of a younger brother not to be the possession of the heir.

14. Acknowledgment in writing, signed by the person in possession or receipt of profits, given to the person entitled, or his agent, to be equivalent to possession or receipt of rent, and the right to recover shall be deemed to have first accrued at and not before the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given.

15. Where possession is not adverse at the time of passing the act, the right shall not be barred until the end of *five* years afterwards, notwithstanding the period of *twenty* years hereinbefore limited shall have expired.

16. Persons under disability of infancy, lunacy, coverture, or beyond seas, and their representatives, to be allowed *ten* years from the termination of their disability or death, notwithstanding the period of *twenty* years hereinbefore limited shall have expired.

17. But no action, &c. shall be brought beyond *forty* years after the right of action accrued, although the person under disability at such time may have remained under one or more of such disabilities during the whole of such *forty* years, or although the said term of *ten* years from the time at which he shall have ceased to be under any such disability, or have died, shall not have expired.

18. No further time to be allowed for a succession of disabilities.

19. Scotland, Ireland, and Man, Jersey, and other adjacent islands, not to be deemed places beyond seas.

20. When the right to an estate in possession is barred, the right of the same person to future estates in reversion, remainder, or otherwise, shall also be barred, unless in the mean time the land or rent shall have been recovered by some person entitled to an estate, interest or right which shall have been limited or taken effect after or in defeasance of such estate or interest in possession.

21. Where tenant in tail is barred, remaindermen, whom he might lawfully have barred, shall not recover.

22. Possession adverse to a tenant in tail shall run on against the remainder-men whom he might have barred.

23. Where there shall have been possession under an assurance, by a *tenant in tail*, which shall not bar the remainders, they shall be barred at the end of *twenty* years after the time when the as-

surance, if then executed, would have barred them.

24. That after December 31. 1832, no suit in equity be brought after the time when the plaintiff, if entitled at law, might have brought an action.

25. In cases of express trust, the right shall not be deemed to have accrued until a conveyance to a purchaser.

26. In cases of fraud, no time shall run whilst the fraud remains concealed, unless the same with reasonable diligence might have been known or discovered.

27. Saving the jurisdiction of equity in refusing relief on the ground of acquiescence or otherwise.

28. Mortgagor to be barred at the end of *twenty* years from the time when the mortgagee took possession, or from the last written acknowledgment; and when there shall be more than one mortgagor, or more than one person claiming through him, such acknowledgment shall be as effectual as if the same had been given to all; but where there shall be more than one mortgagee, or person claiming, such acknowledgment shall be effectual only as against the party or parties signing as aforesaid.

29. No lands or rents to be recovered by ecclesiastical or eleemosynary corporations sole, but within two incumbencies; (that is to say) the period during which two persons in succession shall have held the office or benefice, and *six* years after a third person shall have been appointed, if the times of such two incumbencies and such term of *six* years taken together shall amount to *sixty* years; and if not, then during such further number of years in addition to such *six* years as will, with the time of the holding of such two persons, make up the full period of *sixty* years; and after December 31 1832, no entry, distress, action or suit shall be made or brought at any time beyond the determination of such period.

30. That after December 31. 1832, no advowson to be recovered but within three incumbencies; but if the times of such incumbencies shall not amount to *sixty* years, then after the expiration of such further time as, with the times of such incumbencies, will make up that period.

31. Incumbencies after lapse to be reckoned within the period, but not incumbencies after promotions to bishoprics.

32. Persons claiming an advowson in remainder, &c. after an estate tail, to be barred when the tenant in tail would have been barred.

33. That after December 31. 1832, no advowson to be recovered after 100 years, unless the benefice be subsequently obtained on the presentation of the person claiming, or of some person through whom he claims, or of some other person entitled in respect of an estate, share or right held or derived under the same title.

34. At the end of the period of limitation, the right of the party out of possession to be extinguished.

35. Receipt of rent to be deemed receipt of profit as against the lessee.

36. Real and mixed actions abolished, after December 31. 1832, except for dower, quare impedit, and ejectment.

37. Saving the rights of persons entitled to real actions only at the commencement of the act, who may bring them in the time during which they might have entered, if their right of entry had not been taken away.

38. No descent, discontinuance or warranty to bar a right of entry or action.

39. After December 31. 1832, non-user of profits or easements for *twenty* years to bar the right thereto (except rents and services) except in case of agreement to suspend the use or taking, or in case of any of the disabilities before mentioned.

40. Money charged upon land and *legacies* to be deemed satisfied at the end of twenty years if there shall be no interest paid, or acknowledgment in writing in the meantime.

41. No arrears of dower to be recovered for more than six years.

42. No arrears of rent or interest to be recovered for more than six years.

REVIEW.

A General Treatise on Statutes: their Rules of Construction, and the proper Boundaries of Legislation and Judicial Interpretation. Including a Summary of the Practice of Parliament, and the Ancient and Modern Method of Proceeding in passing Bills of every Kind. With an Appendix of Precedents, Forms, Rules, and Orders. Part the First: Parliamentary. Part the Second: Legal. By Fortunatus Dwarris, of the Middle Temple, Esq., Barrister-at-Law. London: Saunders and Benning. 1831.

(*Continued.*)

MR. DWARRIS next considers the ancient mode of making laws.

The course our ancestors pursued in procuring a bill to pass into a law, was the most obvious and natural, and agrees admirably with the simplicity of those unlettered times. As one of the principal ends of calling Parliaments together was avowedly the "redress of the mischiefs and grievances that daily happen'," not only had the Commons a chief care in the beginning of Parliaments, to appoint their committees of grievances, but receivers[b] of petitions were regularly named;

[a] 4 Inst. 11. citing 36 Ed. 3. c. 1. & 4. and al. Rot. Parl. 1 Hen. 5. no. 17. 13 Hen. 4. no. 9.

[b] There appears to be some doubt *by whom* receivers and tryers of petitions were appointed. Elsynge has collected the precedents.

An. 25 Ed. 3. *sont assignez.*

An. 20 Ed. 3. *furent assignez;* without saying by whom.

An. 21 Ed. 3. *Fu ordene que certeines persons seroient assignez pour recever les petitions.* But ascending higher, an. 6 Ed. 3. saith, "*par nostre*

some for England, and some for the dominions beyond seas. "Then, were appointed of the nobility, (lords of Parliament, and bishops,) certain tryers[b] of petitions, to try out whether they were reasonable and fit to be propounded." The evils that required, or were supposed to require, an immediate remedy, were thus brought under the early notice of Parliament, as soon as it assembled.

The two kinds of petitions, public and private, are then described, with the mode of proceeding upon them. It was not until the separation of the two Houses of Parliament that the principal acts were made on the petition of the Commons. These petitions were answered by the king, with the advice of his council.

If the answer of the king, when it was obtained, proved favourable, it still remained to digest the whole into the form of a statute. This was too important and too delicate, as well as difficult a task, to be intrusted to common care or ordinary hands. The bills themselves, therefore, were drawn (perhaps left) in the form of petitions, which were entered on the Parliament rolls, with the king's answer subjoined, not in any settled form of words, but as the circumstances of the case required; and at the end of each Parliament, (but not until a dissolution,) the judges drew them into the form of statutes, which were entered on the statute roll.

By the 8 Henry 4. it was enacted, at the request of the Commons, that certain members of that House should be present at the engrossing of the rolls. This had become necessary from the practice of making alterations in the entries, whereby the acts were rendered materially different. Mr. Dwarris is justly indignant, not only at the corruption of the Judges, who had the care of the parliamentary rolls, but at the reprehensible silence of all the historians.

That such confidence, so reposed, should have been scandalously violated, might certainly, to sober minds, appear incredible. But, unfortunately, too many instances of a similar kind, "begot from the iniquity of the times," clearly show to what a frightful extent of judicial profligacy a heedless subserviency to the wishes of a court may imperceptibly, because gradually, lead. Regarded in this light, the criminal silence of historians is particularly deserving reprobation. It is always to be hoped that the due mention of such unprincipled proceedings may excite a salutary terror[a]; or, perhaps, operate as a timely warning. At all events, *he* is not a useful writer, who avoids or neglects, as he proceeds, to mark the boundaries of right and wrong;—he is not an honest one, who, encountering such delinquents *on his way*, hesitates to brand them with the infamy they have deserved!

The same complaints were afterwards repeated, in the second year of Henry V., and our author, in noticing the petition of the House of Commons on that occasion, observes, that besides its intrinsic importance, it is remarkable as furnishing the earliest instance in which the House adopted the English language.

They had noble sentiments to utter, and they must have presently discovered that they were able to embody them in suitable expressions; that there was no want of copiousness or of energy in the vernacular tongue. The instrument in question is written with great facility, as well as animation and vigour of style. It prays that "So as hit hath ever be their libte and freedom that thar sholde no statute ne law be made offiasse that they yaf thereto their assent; considering that the comune of your londe, the whiche that is and ever hath be a member of your Parlement, ben as well assentors as petitioners, &c." The authors of the Parliamentary History say the roll of this Parliament is lost, and suppress this petition!

About the close of the following reign, that of Henry VI., bills in the full and complete form of acts of parliament, ac-

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Seigneur le Roy and son Conseil." And they were nominated, it should seem, before Parliaments assembled, though after 29 Ed. 3. the cause of summons was always declared first, before the names of the receivers and tryers were published. Thus

An 40 Ed. 3. the Lord Chancellor concludes his speech touching the summons, "*que chescun qui se sent grievez mette devant sa petition a ces (qui) sont assignez de par luy les receiver aussi de les trier.*". Elsynge concludes, "These satisfy me fully that none but the king or the Lord Chancellor *de par luy* appoints these receivers and tryers, &c. I have perused all the records of Edward III. for this purpose, for that some doubt had been made thereof." From the same writer we learn that receivers of petitions were ever the Masters of the Chancery; but when receivers began to be out of use, and named *pro formâ tantum*, the Judges were mingled with them. As none that were summoned to Parliament were appointed receivers, so none but those who were summoned, were appointed tryers of petitions; "they were ever of the prelates and nobles and Judges;" a distinction that has escaped the sagacity and attention of Mr. Reeves, by whom receivers and tryers are confounded; which is the more extraordinary, as an explicit account of them is to be found in the 4th Institute. The Chancellor and Treasurer were appointed to be called, when need required and they could attend.—*Elsynge.*

[a] That "the execution of Tresylian, and the banishment of the other '*legicides*, did serve as *a circumspecté agatis* to the succeeding Judges till Elizabeth's reign, see *Petyt. Jus. Parl.* c. 8.' The same may be said of the fate of Dudley and Empson," and the impeachment of the Judges who concurred in the judgment against Hampden. See *Luders' Tract on the Station and Character of the Judges of the 16th and 17th Centuries.*

cording to the modern custom, were introduced. This, according to Sir Matthew Hale, was only "a return to the juster method" which originally prevailed in the time of Edward I., "when acts were drawn up in the form of a law in the first instance, and so assented to by both Houses and the king."[a]

This opinion, (says Mr. Dwarris,) which the learned writer states to be drawn from "the very observation of the contexture and fabric of the statutes of those times," does not come supported by any (other) authority, or verified by any instances adduced in the progress of his work. It asserts, or rather infers, a fact little agreeable, perhaps, to probability and the natural course of events. But it is, nevertheless, entitled to great respect, as the judgment of a very profound lawyer upon the structure of those early records, and the internal evidence afforded by the statutes themselves of the early and general concurrence of all the branches of the legislature.

One convenience, certainly, attended the ancient practice — that the acts were skilfully prepared by competent persons. In the preface to his Report (part 2.), Coke seems to regret its discontinuance. "If," says he, "acts of parliament were after the old fashion penned, and by such only as perfectly knew what the common law was, before the making of any acts of parliament concerning that matter, as also how far forth former statutes had provided remedy for former mischiefs and defects discovered by experience, then should very few questions in law arise, and the learned should not so often and so much perplex their heads to make atonement and peace by construction of law between insensible and disagreeing words, sentences, and provisoes, as they now do." By "the Judges," it has been shown, acts of parliament were "after the old fashion penned;" and *they* best answer the description of such as perfectly know what the old law was. The king's serjeants, and king's counsel too, in the character of assistants, used to assist the tryers of petitions in trying out what petitions were reasonable, and considering what new enactments were required, and sat in attendance in the treasury chamber for that purpose; and why should they not now? "On a joint committee of Lords and Commons, neither the Judges (being but assistants), nor the queen's counsel (being but attendants of and upon the House), were ever nominated a joint committee in the Lords. But where the Lords themselves do appoint a committee to consider of some ordinary bill, especially if it concerns matter of law, it hath been anciently used, and may still, without prejudice to the honour of the House, that the king's learned counsel, but especially the Judges, may be nominated as committees alone, or as joint committees with the Lords."— *Towns. Coll.* 9.

The important consequences of this alteration are then pointed out. A principle was from this time established, that the king must admit or reject the identical instrument without qualification; and hence, observes Mr. Dwarris, an extraordinary effect was wrought on the character of our constitution.

So long as the king continued to grant petitions in part, and to engraft new matter upon them (it must be admitted in candour, and as some extenuation of the conduct of the Judges), it would be extremely difficult, at a distance of time from the petition and answer, to draw up statutes which should be the acts of the whole legislature. But when bills were brought into either House of Parliament, in a perfect shape, containing the royal assent and the whole form of a law which the king had no power to modify, but could only reject, it became manifest, if such bills passed into a law, that they derived their entire efficacy from the joint concurrence of the three branches of the legislature. Besides, the invariable course of passing bills by petition and answer affords a constitutional argument against the king's deliberative interference in legislation. His province is simply to reject or approve, not to recommend, what laws ought to be passed. The power of legislation given by two statutes[b] to Hen. 8. was a direct infraction of the constitution; a royal proclamation[c] never properly possessed any efficacy to create or alter a law.[d]

"The victory of the Commons was, by this change, complete. Their power, as an integral and indispensable part of the legislature, which they had been long labouring to establish, was now firmly consolidated; and they were effectually secured against any future violations of their legislative rights. It was at this period, therefore, for the first time, true in *practice*, though it had been long before correctly stated as the *principle* of our government, that '*le ley de la terre est fait en Parlement, par le Roy et les Seigneurs, Espirituels et Temporels, et tout la Communauté du royaume.*'"[e]

Here we must close our account of the historical part of the work, and proceed briefly to notice the remainder. In the second chapter the modern manner of proceeding in Parliament is minutely described, and the forms observed on a new Parliament are treated both historically and practically, and various points of the Law and Practice of Parliament are fully and ably discussed.

[a] Hale's Hist. Com. Law.

[b] 28 Hen. 8. c. 17.; 31 Hen. 8. c. 8.

[c] Case of Proclamation, 12 Rep. Brodie's Hist. and Introduction.

[d] Prynne, in contending for the sovereignty of Parliament, makes the following use of this doctrine: — "The king cannot alter any one word or letter in bills, but must either absolutely assent to or consider further of them. A clear proof that the chiefe power of making laws is only in the people."— *Prynne's Parliament and Kingdom the Sovereign Power.*

[e] 11 R. 2. Rot. Parl. vol. 3, p. 293.

The several Privileges of Parliament are considered in chapter 3., in the course of which the opinion of Mr. Justice Blackstone, regarding the undefined and arbitrary nature of those privileges, is controverted, and the principle examined on which they are claimed and allowed. The general student, as well as the practical lawyer, will derive benefit from the manner in which the subjects of this chapter are treated; their origin, nature, and extent are investigated, and we are made acquainted with their past as well as present state.

Herein is also discussed the various cases of exemption from arrest, not only for debt, but on attachment for nonpayment of money and the nonperformance of an award. The *exceptions* are then enumerated; such as indictable offences, obedience to writs of *habeas corpus*, and liability to the bankrupt laws. The *duration* of the privilege comes next, which, by analogy to the extent of privilege of *franking* letters, seems to be limited, in favour of the members of the House of Commons, to forty days before and after the summons of prorogation.[a] The duration of the privilege of *peers* is perpetual. After a dissolution, a convenient time is allowed; but its precise extent has not been determined. The vindictive privileges of the House are next noticed; namely, for punishing contempts, violence to members, &c. The exemption of the members from serving on juries during the sitting of Parliament is continued; but their attendance as witnesses appears to be necessary, though the former exemption has not been formally abolished.

In the 4th chapter, amongst other matters relating to the commencement of a session and the routine of business, the method of making Laws is minutely described, both as to public and private Bills, and the requisite notices of consent, and the form and manner of proceeding with Petitions, are practically detailed.

From these, the work proceeds to the different stages of bills in both Houses, with the course of proceeding in committees; and, subsequently, are considered particular sorts of private bills; and to these succeed the fees of the House, agents' charges, and approved precedents. These matters occupy the 5th, 6th, 8th, and 9th chapters.

The 7th chapter relates to the members who may sit and vote in Parliament—the manner of attending, speaking, and voting, in both Houses—the manner of taking the Chair, putting the question, &c. and giving the votes—divisions—proceedings between the two Houses—impeachments—bills of attainder, pains and penalties, &c.—adjournment, prorogation, and dissolution.

This intermediate chapter is evidently a part of the work full of interesting matter to the senator, the lawyer, the student, the general reader, and to all classes interested in the public business of the country. It also furnishes information, by way of precedent, to the conductors of all assemblies where business is discussed, whether public or private—whether relating to general politics, the affairs of learned societies, or the management of commercial establishments; for it is in the distinguished assemblies of the two Houses of Parliament in this country that we may expect the best models, matured by long experience, for conducting public discussions and the good management of a deliberative body.

If we have any objection to the arrangement adopted by the author, it is to the placing of this 7th chapter amidst the practical parts of the work. We think it should have followed the 3d chapter, on the nature and extent of the privileges of Parliament. By this mode, precedence would have been given to all the general topics and matters of public interest forming the principal division of the work; and the other might then have been confined to the forms of business, and the various kinds and modes of proceeding relating to bills in both Houses. Although the author has aimed at the production of "a readable book," it was not necessary that the *readable* parts of it should be scattered at distant intervals: the materials were capable of being divided into equal portions of the readable and the practical; and it would certainly have been favourable to the facility of reference, had the course been adopted which we have thus pointed out. This, however, is a matter of comparatively minor importance.

We think, as already intimated, that the work is highly creditable to the author; and the plan of combining the historical and scientific with the practical, is one that we would encourage to the utmost of our humble influence; for by this union, we think, the dignity and best interests of the profession are to be promoted; yet, we are aware, it is the general opinion of those who are supposed to know the wants of the professional reader, that even the

[a] This is the received opinion, but there is no decision on the point.

learning, acumen, and originality of a *Hargrave*, are unacceptable to the present race of lawyers. We hope the time is approaching, if it has not arrived, when there will be no lack of encouragement of the legal writer and antiquarian, or of researches into the history and philosophy of the law. At all events, whatever may be the taste of the active practitioner himself, we trust he will not fail to recommend to those who, under his instruction, are destined to be the future members of the profession, to imbue their minds with the grounds and principles of jurisprudence, and the origin and history of our municipal law, as well as its present state and practical operation. We think it by no means creditable, that the members of a learned profession should content themselves with the dry letter of the existing law—"looking neither before nor after;" caring not for the labours of their ancestors, nor anxious for the welfare of posterity — unobservant of the past, and heedless of the future — uninstructed by the errors of the one, and neglectful of improvement for the benefit of the other.

THE RESULTS OF THE COMMON LAW COMMISSION.

Our readers will be in possession, ere this time, of the Third Report of the Common Law Commissioners. Having been favoured with an early copy, we have published it as an Appendix, to be attached (for the convenience of our Subscribers) either to the present, or the Monthly Work. We shall at an early opportunity make such observations as occur to us, both on the measures which the Commissioners recommend to be adopted, and those parts of the present system which they advise to remain unaltered.

When the Commissioners to enquire into the State of the Law were first appointed, many persons were confident that their labours would lead to nothing. We shall at present shortly recapitulate some of the results of them; and we boldly ask, whether this "bit by bit" reform is not the most effectual, as well as the most safe, that can be applied to our laws? We would also ask whether, if these reforms and similar ones are the result of the commission, the appointment has not been justified?

1. The abolition of the separate judicature of Wales, and the admission of the principality to the benefits of the general judicial system; by which the complete consolidation of England and Wales is at length, for the first time effected. — 1 Will. 4. sess. 1. c. 70.

2. The strengthening of the judicial establishment of Westminster Hall by the appointment of three additional Judges, by which the Welsh circuit is provided for, and great despatch given in various ways to the general business of the Courts.—*Ibid.*

3. The better regulation of the terms, the fixing of Easter term, and the substitution of a simple method of returns in lieu of essoign or general return days. — *Ibid.*, and 1 Will. 4. sess. 2. c. 3.

4. The establishment of a more reasonable and convenient system of appellate jurisdiction among the Courts at Westminster, by which the writ of error from the Common Pleas to the King's Bench is taken away, and a writ of error given from each of the three Courts to the other two. — 1 Will. 4. sess. 1. c. 70.

5. Power given to the Judge to pronounce sentence (in case of misdemeanors, &c.) at the trial, in lieu of the former inconvenient system, by which judgment was postponed till the full Court met in banc. — *Ibid.*

6. The breaking up the monopoly of the officers of the Court of Exchequer, the admission of all attorneys to practise therein, and its consequent establishment upon an equal footing with the other Courts in Westminster Hall.—*Ibid.*

7. A provision by which rules of practice are required to be made by all the Judges of the three Courts jointly, or by eight of them at least, whereby foundation is laid for the future uniformity of their practice.—*Ibid.*

8. Provisions for giving immediate judgment and execution upon a verdict, in lieu of the former system, by which judgment and execution were postponed till the next term, and the plaintiff often subjected to the ruinous delay of several months. — *Ibid.*, and 1 Will. 4. sess. 2. c. 7.

9. Provisions, giving increased facility to landlords as to the time of bringing an action of ejectment, and protecting them from the inconvenient and prejudicial delay to which they were formerly exposed, when the right of entry occurred at certain periods of the year.— 1 Will. 4. sess. 1. c. 70.

10. The improvement of the course of proceeding in prohibition and mandamus, by which some unnecessary expense is saved, and some unmeaning forms rescinded, and proper provision made for payment of costs to the successful party. — 1 Will. 4. sess. 2. c. 21.

11. Power given to the Courts of Common Law to order the examination of witnesses upon interrogatories, and to order a commission to issue for examination of witnesses abroad, the want of which power has hitherto been productive of great difficulty, delay, and expense, and sometimes of an absolute failure of justice.— 1 Will. 4. sess. 2. c. 22.

12. Various provisions with respect to bail, tending to the material diminution of difficulty and expense, to the abolition of the disgraceful system of sham bail, to the better security of the plaintiff against insufficient bail, and to the greater facility of the defendant in procuring

Bail. — 1 Will. 4. sess. 1. c. 70. *Regulæ Generales* of Trinity Term last.

13. The retrenchment and simplification of the technical forms of demand in certain actions of the most ordinary occurrence, by which considerable expense is saved, and the foundation laid for still more important reforms of the same description. — *Regulæ Generales* of Trinity Term last.

A NEW SERIES OF LAW REPORTS.

To the Editor of the Legal Observer.

Sir,

In this bookmaking and bookselling age, I have long been anxious to distinguish myself by bringing out some work which would be at once new and popular; and I have for this purpose gone over the whole range of the law; but have found almost every subject sufficiently investigated. In this dilemma I betook myself to miscellaneous literature; and here, Sir, I hope I have discovered a mine of legal information, under the disguise of poetry and fable.

You remember the story of the senior wrangler, who returned one of Shakspeare's plays to a friend who had lent it to him, with the simple observation, "that it proved nothing." Now, I hope to be able to prove that there is much legal learning in the great poems which are familiar to the world; and that, if taken up with that view, they are all capable of affording new and interesting matter to the lawyer.

I propose, therefore, shortly to publish "A new series of Reports, to be selected from the popular poetry of the ancients and moderns."

I find that, owing to the embellishments and fanciful descriptions of the poetical reporters, we cannot very easily get at the truths of the case. I have, however, examined all their reports with great care, and, where it was possible, compared them with the register's book; and I hope that, by scrutinising closely the real state of the case, and stripping them of all unnecessary details, I shall be able to present to the public a series of cases, which will be of very considerable authority and importance, both as precedents and as furnishing much valuable matter.

The speeches of counsel will be found to be rather highflown, and to remind us rather of the Irish than the English bar; but this will add to the novelty of the publication.

As a sample, I commence with Homer's Iliad, which may be fairly considered as being merely an action of ejectment. I have thus entered it in my note-book: *Doe on the demise of Priam* v. *Agamemnon and others*, 1 Hom. Pope's edition, p. 1. *et seq.*

The lessor of the plaintiff relied on a very ancient possession of himself and his ancestors, from time beyond which the memory of man was not to the contrary; he had no documentary evidence, but rested mainly on the presumption that his ownership was rightful. The defendants relied on the prior title, and that the conduct of the lessors of the plaintiff and his agents had been such as to invalidate his long possession. Several collateral issues were tried, which need not be particularly mentioned.* After some attempts at a compromise, the cause came on for argument. I take Mr. Pope's report in preference to the others, as the most full on this point. But the speeches of counsel are also well given in 2 Cowper.

Hector, for the plaintiffs.

"Now some God within me bids me *try*
Thine or my fate — I kill thee or I die.
Yet on the verge of battle let us stay,
And for a moment's space suspend the day."

He then clearly proposes to refer the cause to arbitration:

"Let all high powers be call'd to *arbitrate*
The just conditions of this *stern debate*,
(Eternal witnesses of all *below*,
And faithful guardians of the treasured vow!")

(Meaning, evidently, that his witnesses were below, and were prepared to swear to the facts of the plaintiff's case).

"Now plight thy mutual oath, I ask no more."

That is to say, enter into the arbitration bond.

Achilles, for the defendants, declined, however, to agree to arbitration, and replied rather warmly —

Talk not of oaths, (the dreadful chief replies,
While anger flash'd from his disdainful eyes,)
Nor oath, nor pact, Achilles plights with thee!
——————— one constant state
Of lasting rancour and eternal hate;

* These were chiefly *Patroclus* v. *Hector* — trespass, and assault and battery; plea, *son assault demesne*. *Agamemnon and others* v. *Achilles* — action on the case for damages done to vessels, armies, &c.; pleas, release, and set-off of work and labour, and money paid to plaintiffs: —

"Long toils, long perils, in your cause I bore,
But now th' unfruitful glories charm no more.
Of all my dangers, all my glorious pains,
A life of labours, lo! what fruit remains?
Long sleepless nights in heavy arms I stood,
And sweat laborious days in dust and blood.
I sack'd twelve ample cities on the main,
The wealth I gathered ———————
Your mighty monarch (meaning said plaintiff),
these in peace possess'd," &c.

No thought but rage, and never ceasing strife,
Till death extinguish rage, and thought, and life.
Rouse then thy forces this important hour,
Collect thy soul, and call forth all thy power
No farther subterfuge, no farther chance."

This is simply telling the plaintiff's counsel, that he had better proceed at once, and call his witnesses.

The cause proceeded; but the evidence for the plaintiffs appears to have broken down considerably; and *Achilles* confidently declares that he is so sure of a verdict, that he would not accept any sum for the lands in question.

"Should Troy to bribe me bring forth all her store,
And, giving thousands, offer thousands more;
Should Dardan Priam, and his weeping dame,
Drain their whole realm," &c.

Hector replied: —

"Thy rage implacable! too well I know,
The Furies that relentless breast have steel'd,
And curs'd thee with a heart that cannot yield.
Yet think a day will come, when fate's decree,
And angry gods shall wreak this wrong on thee."

Hinting thereby, that he shall appeal, and that *Achilles* may be then beaten.

Achilles, however, then went for a nonsuit, in which he succeeded; and by some mistake *Hector*, instead of the plaintiff, as is the usual custom, *was called three times round the Court.*

I am, Sir,
Your obedient servant,

* † *

PRACTICAL POINTS OF GENERAL INTEREST.

No. VIII.

LIFE INSURANCE.

A PERSON who insures the life of another must have an interest in the life assured; and if he have no interest, the policy will be void. — 14 Geo. 3. c. 48. § 1. A creditor has clearly an interest in the life of his debtor; *Anderson* v. *Edie*, Park on Ins. 640. 7th edit.; if the debt has been incurred on good consideration. *Dwyer* v. *Edie*, Park on Ins. 689.; ibid. 689. See the cases collected 3 Stew. Prac. Convey. 129.

It has, by a late important case, been decided that this interest must be a direct pecuniary interest, and therefore that a party has not such an interest in the life of his wife or child as he can legally make the subject of an insurance. We allude to the case of *Halford* v. *Kymer*, 10 B. & C. 722., which is shortly as follows: —

This was an action of covenant on a policy of insurance, dated February 13. 1826, whereby the directors of the Asylum Life Insurance Company agreed with the plaintiff to insure the life of R. B. Halford, the son of the plaintiff, in the sum of 5000*l.* for the term of two years; and covenanted, that if R. B. Halford should die at any time within the term of two years, to be computed from the day of the date of that policy, the funds of the Company should be liable to pay, within eight calendar months after proof of the death of the said R. B. Halford within the said term of two years, unto the said R. Halford, his executors, &c. the sum of 5000*l.* Plea, first, that at the time of making the policy in the declaration mentioned, the plaintiff was not interested in the life of the said R. B. Halford; secondly, that at the time of the death of the said R. B. Halford, the plaintiff was not interested in his life. At the trial before Lord *Tenterden* C. J., at the Middlesex sittings after Easter term, it appeared, from the statement of the plaintiff's counsel, that by a settlement, dated May 18. 1805, made on the marriage of the plaintiff with S. T. Bargrave, the sum of 8000*l.*, and also the moneys to arise from the sale of certain freehold and leasehold estates, were settled, after and subject to the trusts for the plaintiff and his wife successively during their lives, in trust for the children or child of the said marriage, according to the appointment of the said plaintiff and of his said wife, as therein mentioned; and in default of appointment, if there should be but one child of the said marriage, then in trust for such child, to become a vested interest in such child, if a son, at the age of 21 years; and if no child of the said marriage, or issue of such child, shall become entitled to the vested interest in the said trust moneys, then, upon such trusts as the said S. T. Bargrave should appoint; and, in default of appointment, in trust for her next of kin, as if she had died intestate and unmarried. There was only one child of the marriage, namely, R. B. Halford; and the marriage of the plaintiff with the said S. T. Bargrave having been dissolved by act of parliament, the plaintiff married again, and effected the policy in question to provide against the death of his son, R. B. Halford, before he attained the age of 21. The said R. B. Halford did attain the age of 21 years on the 2d of June, 1827; and on the 5th of January, 1828, made his will, and thereby gave all his real and personal estate to the

plaintiff, his father, and appointed him sole executor, and died on the 11th of January, 1828. The plaintiff, on the 17th of July, 1828, proved his son's will in the Prerogative Court of the Archbishop of Canterbury. Upon this statement of facts, Lord *Tenterden* was of opinion, that the plaintiff not having any pecuniary interest in the life of his son at the time when he effected the policy, the same was void by the stat. 14 Geo. 3. c. 48. § 3., and he nonsuited the plaintiff; but reserved liberty to him to move to enter a verdict, if the Court should be of opinion that he had an insurable interest.

F. Pollock now moved accordingly. It is quite clear that but for the stat. 14 Geo. 3. c. 48. this policy would be available. That statute, by § 1., enacts, "that no insurance shall be made by any person or persons on the life of any person or persons, or on any event or events whatsoever, wherein the person for whose use, benefit, or on whose account, such policy shall be made, shall have no interest, or by way of gaming or wagering; and that every insurance made contrary to the true intent and meaning thereof shall be null and void to all intents and purposes whatsoever." Now, the plaintiff clearly had an interest in the life of his son, for he might reasonably expect that the latter would reimburse him the expense of his maintenance and education. This clearly was not a wagering policy within the meaning of that clause. It is true that the third section enacts, "that in all cases where the insured hath interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer than the amount or value of the interest insured on such life or lives, or other event or events." It is clear that a man may effect an insurance on his own life, although he may have no pecuniary interest depending on it, and although his own income may be of the most ample kind, and not depending on his own exertions, or on any contingency; and if that be so, upon what principle can it be said that he cannot have an insurable interest in the life of his son, or his wife? If a man be deprived of the comfort, society, and assistance of his wife, by the misconduct of another, he may recover damages for that loss. So, if he be deprived of the services of his daughter by her seduction, or if he lose the assistance of any other member of his family by the wrongful act of another, he may maintain an action for damages. Surely the law which gives the man a right of action for the wrongful act of another, by which he is deprived of the assistance of his wife, daughter, or servant, will not prevent him from protecting himself against that casualty which for ever deprives him of that assistance. [*Bayley* J. In *Innes* v. *The Equitable Assurance Company* (which was tried before Lord *Kenyon*), the plaintiff had effected a policy on the life of his daughter. In order to show that he had an interest, he produced a paper purporting to be a will, by which it appeared that he was entitled to the sum of 1000*l.* in the event of her dying under the age of 21 years. One Gardiner swore that he was a subscribing witness to the will, and that it was made at Glasgow, and that he was acquainted with the other subscribing witnesses; but another of those witnesses stated that it was not made at Glasgow, but by a schoolmaster in the Borough. Innes was tried, convicted, and executed for the forgery; and Gardiner, who had sworn that the will was made at Glasgow, was convicted of perjury.] [Lord *Tenterden* C. J. It was, in effect, admitted in that case, that it was necessary to prove that the father had a pecuniary interest in the life of his daughter; otherwise there would have been no occasion to go into the question as to the will; and unless it was a fact material to the case, the witness could not have been convicted of perjury.] That was only a *nisi prius* case; but a father has a legal interest in the life of his son sufficient to entitle him to insure. By the stat. of Eliz., if a father become poor in his old age, and his son be capable of maintaining him, he is bound to do so. Now, why does a man insure the life of his debtor? Because the death of his debtor diminished the chance of his being paid. So, if a son dies, the chance of the father being maintained in poverty and old age is diminished. [The parish is bound to maintain him; and it is indifferent to him whether he be maintained by the parish or his son.] The amount of maintenance which a parish must afford may, in many cases, be much less than that which a son would be ordered to pay. Besides, a father may have a claim on a son, when he has no claim on a parish. He may not be able to show his settlement in the parish from which he claims relief. In that case, the life of his son would be of importance to him, as affording him the certainty of having a comfortable provision. The word "interest" in the act of parliament is not to be confined in construction to pecuniary interest, but may be taken to mean legal interest; and the third section, which allows the insured to recover the

amount of the value of his interest, shows that the law would recognise an interest of any kind, provided a value could be set upon it.

Lord *Tenterden* C. J. I retain the opinion which I expressed at the trial, that the word interest, in this statute, means pecuniary interest.

Bayley J. It is enacted by the third section, "that no greater sum shall be recovered than the amount of the value of the interest of the insured in the life or lives." Now, what was the amount or value of the interest of the party insuring in this case? Not one farthing, certainly. It has been said, that there are numerous instances in which a father has effected an insurance on the life of his son. If a father, wishing to give his son some property to dispose of, make an insurance on his son's life in his (the son's) name, not for his (the father's) benefit, but for the benefit of the son, there is no law to prevent his doing so; but that is a transaction quite different from the present; and if a notion prevails that such an insurance as the one in question is valid, the sooner it is corrected the better.

FEES OF ATTORNEYS, AND THEIR CERTIFICATES.

To the Editor of the Legal Observer.

SIR,

SINCE reform in the law is making such rapid strides, it behoves attorneys to take some steps for the protection of their interests, and the support of their estimation in society, which hitherto, from the general supineness of the body to act in concert, have been shamefully neglected.

The subjects for consideration are, 1st. That the fees to attorneys should be settled upon a different principle, both as regards agency and proper business. 2dly. The taxation of bills. 3dly. The certificates. 4thly. Articled clerks, and the admission to practice and conveyancers. The limits of your publication will scarcely afford space to enter minutely into all these subjects, and urge every argument that presents itself: I shall, therefore, now only take two into consideration; the principle of *fees*, and the *certificates*.

It is absurd that the *length* of proceedings should in all cases be held as the chief test of remuneration, to the extent that is now adopted; for verboseness is too often the result of ignorance rather than ability. Thus, in briefs at common law, the same allowance is made for the pleadings, as for drawing the case and the evidence: now, it must be admitted that there is more time expended and more talent required for the latter portion than the former; and again, this allowance includes all the time expended in collecting the evidence. Such fees cannot remunerate the diligent practitioner; and he is compelled to resort to the practice of inserting all the comparatively useless details he can collect, and to swell his brief with copies and extracts of documents. In Chancery, every order and report in the cause is crowded into a petition and brief, while in this mass of confusion the real point is liable to be overlooked.

As to certificates, it is well observed by the Edinburgh Review, in the article on Paper Duties, "that we have not suffered so much from the *magnitude* of the sums required for the public exigencies, as from the *mode* in which the portions of these sums have frequently been raised. It is the *inequality* and *oppressiveness* by which many parts of our system of taxation are characterised, that render it productive of so much mischief." The annual certificate duty which attorneys pay is one of those taxes of "inequality and oppressiveness;" an odious poll tax, imposed for no useful purpose but that of raising a fund from a particular class of individuals, who have previously contributed more to the public revenue than any class of the community, by the stamp duty on articles of clerkship and admission; it is as invidious as it is unjust. The apothecary, the surgeon, the physician, pays no tax. Upon what principle is it that the attorney should thus alone be marked out? He is not subject to the excise laws, to make it necessary for the government to have cognisance of his practising; the Courts have the means of regulating this point, if necessary, without the imposition of the worst of all taxes: it does not, it cannot tend to the respectability of its practitioners, nor answer any end but that of raising a revenue at the expense of a few for the benefit of the many.

However, I can scarcely anticipate the relief which ought to be granted, without considerable exertions by the attorneys themselves; they must not continue in the lethargy in which they now exist, but unite and call meetings, resolve and petition, press their grievances upon the consideration of the legislature, and use every lawful influence to obtain redress.

The other subjects I will treat of in a future letter, if deemed of sufficient importance, or likely to rouse the profession to action.

I am yours, &c.

SEAL PAPER.

Court of Chancery, Michaelmas Term 1831.

LORD CHANCELLOR.

At Lincoln's Inn.

Monday,	Oct. 31.	The Seal before Michaelmas Term—Motions.
Tuesday,	Nov. 1.	Petitions.

At Westminster.

Wednesday,	Nov. 2.	Motions.
Thursday,	3.	Appeals and Re-hearings.
Friday,	4.	
Saturday,	5.	
Monday,	7.	
Tuesday,	8.	
Wednesday,	9.	

Thursday,	10.	Motions.
Friday,	11.	Appeals and Re-hearings.
Saturday,	12.	
Monday,	14.	
Tuesday,	15.	
Wednesday,	16.	
Thursday	17.	Motions.
Friday	18.	Appeals and Re-hearings.
Saturday	19.	
Monday	21.	
Tuesday	22.	
Wednesday	23.	
Thursday	24.	
Friday	25.	Motions.

VICE CHANCELLOR.

At Lincoln's Inn.

Monday,	Oct. 31.	The Seal before Michaelmas Term—Motions.
Tuesday,	Nov. 1.	Petition Day — Bankrupt Petitions only to be in the Paper this Day.

At Westminster.

Wednesday,	Nov. 2.	Motions.
Thursday,	3.	Pleas, Demurrers, Exceptions, Further Directions, and Causes.
Friday,	4.	
Saturday,	5.	
Monday,	7.	
Tuesday,	8.	
Wednesday,	9.	
Thursday,	10.	Motions.
Friday,	11.	Pleas, Demurrers, Exceptions, Further Directions, and Causes.
Saturday,	12.	
Monday,	14.	
Tuesday,	15.	
Wednesday,	16.	
Thursday,	17.	Motions.
Friday,	18.	Pleas, Demurrers, Exceptions, Further Directions, and Causes.
Saturday,	19.	
Monday,	21.	
Tuesday,	22.	
Wednesday,	23.	
Thursday,	24.	Short Causes, Pleas, Demurrers, Exceptions, Further Directions, and Causes.
Friday,	25.	Motions.

His Honor will appoint a day for hearing the Cause Petitions during the Term, and will proceed on the Bankrupt Petitions and Motions after Term, previous to the First Seal.

SUPERIOR COURTS.

LORD CHANCELLOR'S COURT.

PRACTICE. — AFFIDAVIT.

If a notice of motion is given, and an affidavit is made in support of it, and the motion is not made, the affidavit cannot be made use of on a fresh notice of motion, if the defendant has, subsequently to the first notice, put in his answer.

Mr. *Pepys* stated that this was a motion for a manager and receiver of "The Sun" newspaper; and that an injunction should be issued, restraining Mr. Young, the editor and part proprietor of that paper, from further interfering with it. He was about to state some facts, from an affidavit made by Mr. Thornton, the plaintiff, when

Sir *Edward Sugden* asked when that affidavit was sworn?

Mr. *Pepys* replied, on the 12th of May last.

Sir *Edward Sugden* said, that as the answer to the bill had been put in since, and as the notice of the present motion was not given until the 6th of June, it was clearly against the practice of the Court to read any such affidavit. If his learned friend chose to make his motion upon the case as it stood on the bill and answer, he was quite ready to meet it; if not, it must stand over.

Mr. *Pepys* declined to proceed without the affidavit, and the matter was therefore postponed until a fresh notice of motion was given.—*Thornton* v. *Young*. L. C. June 13.

ROLLS COURT.

COSTS.— WILL.

Where the construction of a will is attended with difficulty, and a case is directed to a Court of law upon it, the costs of all parties must come out of the estate.

In this case a bill had been filed to ascertain the rights of the parties in certain real estates under the will of a Mrs. Dorothy Axford; the plaintiff contending that the defendants under it took as tenants in common for their lives, and the defendants contending, on the other hand, that they took an estate tail. A case had been directed to the Court of Common Pleas for its opinion thereupon, and it had decided that the defendants took only life estates.* The case now came on for further direction. The only point raised was as to the costs.

Sir *Charles Wetherell* and Mr. *Flather*, for the plaintiffs, contended, that the defendants should pay the costs of the suit; that they had insisted on taking estates to which it had been decided that they were not entitled.

Mr. *Pemberton*, Mr. *Hayter*, and Mr. *James Stewart*, for the defendants, argued, that as the defendants were necessary parties to the suit, and had been forced to come into court by the plaintiff, that, at least, they were entitled to the costs out of the estate.

The *Master of the Rolls* directed, that as the will had been a very doubtful one, the costs of all parties should come out of the estate, according to the several interests therein; and that, if the defendants had not insisted on taking an estate tail, it would have been proper that the plaintiff should pay their costs.—*Bennett* v. *Lowe*. M.R. June 28. 1851.

CHARITY.— PRACTICE.

The Attorney-General must, it seems, appear, where a charity is concerned.

In this case a reference had been made to the Master to appoint proper persons as trustees of

* This case in the Common Pleas is reported *antè* 2 L. O. p. 159., and 7 Bing. p. 535.

a charity, and to settle a scheme for the application of the surplus income of the estates. The master had made his report, and a petition was now presented to confirm the report.

On Mr. *Garratt* appearing to support the petition, the *Master of the Rolls* enquired who appeared for the Attorney-General.

Mr. *Garratt* said, that he believed it was not usual in such cases to make the Attorney General a party; and that, in the case of the *Attorney General* v. *Dove*, 1 Turn. & R. 328,* Lord Gifford had, in a similar case, refused to allow the costs of a separate appearance by the Attorney-General.

The *Master of the Rolls* stated that he was not aware of any such practice, and that he should not make the order in the absence of the Attorney-General, but that he would make enquiries of the Registrar to ascertain whether any such practice had obtained.—*In re Rose's Charity.* M. R. July 8. 1831.

COURT OF KING'S BENCH.

BANKRUPT.—SHERIFF'S RETURN.

Where time will be given to the sheriff to make a return to a writ venditioni exponas.

Barstow shewed cause against a rule calling on the plaintiff to show cause why the rule calling on the sheriff of Hampshire to return the writ of *venditioni exponas*, issued to him, should not be discharged, or why time should not be allowed him to make his return, until an indemnity should be given him by the assignees or judgment creditor, or why he should not be allowed to pay the money arising from the sale of the goods into Court, to abide the event of any suit which might be carried on between the assignees and the judgment creditor. He submitted that the sheriff was here too late in his application. The writ of execution had been received on the 10th of December, returnable on the 11th of January, the first day of Hilary Term. The seizure took place on the 12th of December.

His return was, "goods taken and in hand for want of buyers." The commission of bankrupt did not issue till the 23d of December; and it did not appear from the affidavits, when he had notice of the commission. He did not give us notice until the 16th of March. There is no suggestion by him that any action had been brought against him. He was ruled to make his return on the 15th of April, and therefore he is late in making the present application.

Dampier. He had no right to make the application, until he was ruled to return the *venditioni exponas*. That was not until the 15th of April. It does not appear that he was aware of the adverse claims of the assignees, for any time before he informed the judgment creditor of the commission having issued. He cited *Bernasconi* v. *Farebrother*, 7 B. & C. 381., and *Moreland* v. *Pellatt*, 8 B. & C. 726.

Taunton J. I am of opinion that in this case sufficient negligence on the part of the sheriff has not been shown, to deprive him of his claim to the protection of the Court. It appears to me, from the dates, that he has acted according to the common course, in which writs of *fi. fa.* are usually executed. It does not appear that he had received any notice of the commission having issued until the 16th of March; and that information he immediately conveyed to the judgment creditor. The rule, therefore, must be made absolute for enlarging the time for the sheriff to make his return, unless the judgment creditor or the assignees shall give him an indemnity. The rule calling on the sheriff to make his return must be discharged.

Rule absolute, without costs.

BAIL.—CHANGE OF ATTORNEY.

Where a party is not in custody, bail can not be put in by another attorney without an order for changing the attorney, although the bail is in fact put in by the bail to the sheriff.

Notice of bail had been given, signed by the defendant's attorneys. The bail to the sheriff, to secure themselves, had also given notice of bail, which was signed by their own attorney, but who signed his name as "*defendant's*" attorney, the bail of the sheriff being ignorant of bail having been put in by the defendant. No order had been obtained for the change of attorney.

Parke J. held, that if this had been the case of a prisoner, the attorney might have been changed without leave of the Court; but that not being the case, on the authority of Tidd's Practice, p. 94. ed. 9., the second notice was irregular, and that the bail put in by the bail to the sheriff could not justify; but allowed time.*—*Trigg's* Bail. T. T. July 23. 1830.

TRIAL BY PROVISO.

Where a plaintiff has brought down a special jury cause for trial at the assizes, and the defendant has refused to pray a tales, *the defendant is not entitled to take it down by proviso.*

Barstow moved for a rule to show cause why a rule which had been obtained for a trial by *proviso*, should not be discharged. The plaintiff had brought down the cause (which was a special jury) to the assizes, and had been prepared to try, but the defendant not having prayed a *tales*, the cause had not been tried. This, he contended, was not such a default in the plaintiff as entitled the defendant to his rule for a trial by proviso; for had the defendant chosen to have prayed a *tales*, the cause might have been tried. *Jenkins* v. *Purcell*, 1 Strange, 707. was cited. Rule granted.

On a subsequent day *Chitty* showed cause; but the Court made the rule absolute.—*Phillips* v. *Dance*. M. T. Nov. 18. 1830.

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* It is to be observed, that the practice now is to allow bail to be put in either by the sheriff or his bail, without an order for changing the attorney, whether the party be a prisoner or not. See *Haggett* v. *Argent*, 7 Taunt. 48. 2 Marsh. 365, 366. S. C. *Wheeler* v. *Rankin*, 1 Chit. Rep. 81. *The King* v. *the Sheriffs of London*, in *Plomer* v. *Houghton*, 2 Bar. & Ald. 604. 1 Chit. Rep. 329. S. C. The case on the authority of which the above case was decided is *Keys* v. *Tavernier*, 1 Chit. Rep. 291.

ACT OF BANKRUPTCY.—KEEPING HOUSE.

A mere intention to keep house does not constitute an act of bankruptcy.

This was an action for money had and received, brought by the assignees of a bankrupt to recover from the defendant, the sheriff of Dorsetshire, the proceeds of an execution upon a warrant of attorney, under which the goods of the bankrupt had been seized. On the trial before *Gaselee J.*, at the last assizes for Dorsetshire, two acts of bankruptcy were relied upon for the plaintiff in support of the commission. On the first, which was a departure from his dwelling house, and the other, which was a beginning to keep house, the jury found for the defendant, but the question was reserved for the opinion of the Court, and *Wilde* Serjt. now moved to set aside the verdict.

The bankrupt, who was a shopkeeper, was in the habit of going round the country with parcels of goods to smaller shopkeepers as they were ordered, or might be wanted. In the month of August, 1828, the bankrupt, having received a letter threatening him with an arrest for 75*l.*, wrote to a creditor, stating that, upon taking stock, he found it would be impossible to pay more than 10*s.* in the pound; and that, as he was the heaviest creditor, the bankrupt was willing to assign his effects to him in trust, or to make any other arrangement, and that he hoped he would be able to pay his debts. About this time, in a conversation with his shopman, he told him that he apprehended an arrest, and desired that he might be denied to the neighbouring sheriff's officer, if he should call. He then left his house, taking some linen, and his cart and goods with him, having desired his wife, if any thing should happen, to send information to him at a certain turnpike. A letter was sent after him, from the creditor to whom he had written, offering to take a guarantee for the 10*s.* in the pound, and the bankrupt's acceptance for the rest; upon which he said, "Now I can return to my family in comfort." The learned Judge left it to the jury to consider whether, being in embarrassed circumstances, and giving such directions to his servant, although he took out goods with him, the direction for sending five miles, when the actual distance he was going was only seven or eight, the packing up of linen, and the communication afterwards made to him, were not evidence of a disposition to depart his dwelling-house, under apprehension of an arrest, and with intent to avoid it, and whether the order of denial given to his servant was not to delay his creditors.

Wilde Serjt. contended that an actual delay was not necessary; that it was sufficient if, by his conduct in his house, he shows an intention of avoiding his creditors; nor is it necessary to prove more than that he is in his house with that intention. His declaration to his servant as to the embarrassed state of his affairs showed what his intention was.

Bayley J. There is no evidence of how he was in his house, whether he was concealed or not.

Wilde Serjt. The evidence was, that he was there with an intent to avoid the arrest. It is not necessary to withdraw from his ordinary room, if he tells his servant to deny him. Here then, was a declaration of an intention to avoid his creditors, and that intention was in his house, that is, a beginning to keep house. If it appear that a party intends to use his house as a place of concealment, that is an act of bankruptcy.

Lord *Tenterden* C.J. This did not amount to an act of bankruptcy; although it might have been, if he had followed up the direction by retiring or concealing himself, or conducting himself in a different manner from his usual habits. Here there was no alteration, but a mere direction for denial, not followed up by any denial. As to the other act of bankruptcy, it was nothing more than an inchoate, incomplete intention of committing one. If the message to the turnpike had been such as to have induced him to stay away, it would have amounted to one; but such was not the case.

Bayley J. The jury were warranted in the conclusion which they arrived at; although if, after leaving his house, he had stayed away, it would have been different. As to the beginning to keep house, it is not an act of bankruptcy, unless there be some act to show keeping the house, or an actual denial. In *Lloyd* v. *Heathcote*, 2 B. & B. 388., 5 B. Moore, 189. there was a direction to deny, and a denial. In *Harvey* v. *Ramsbottom*, 1 B. & C. 55., 2 D. & R. 142., the bankrupt not only gave directions to be denied, but the windows were closed, and a previous examination of any person who called was made through the windows. I am not aware of any case, which says that a direction to deny shall be an act of bankruptcy, unless followed up by some act.

Littledale J. concurred.

Parke J. There is no case that a simple intention to keep house shall be an act of bankruptcy. Rule refused.—*Fisher and another, Assignees, &c.* v. *Boucher*. E. T. May 4. 1830.

ANSWERS TO QUERIES.

ESTATE TAIL, P. 223.

In reply to the last of several queries by "A," there cannot be any doubt that if the estate has been adversely held without interruption for twenty years, the tenant in tail is precluded by the statute 21 Jac. 1. c. 16. from the means of recovering it by any of the remedies mentioned by your correspondent. The highest action a tenant in tail can have is the writ of formedon; and that he must bring within twenty years after his title accrues, or be for ever barred.

J. S.

BAILABLE ATTACHMENT.—EXCHEQUER.

In answer to W. S.'s enquiry, I apprehend that although, in general, bail are not themselves to be holden to bail, (for that might occasion bail *ad infinitum*, *per Buller* J., Mic. 28 Geo. 3. K.B.) yet that where any defendant, although sued as bail, is *in contempt* for not appearing, an attachment may issue against him. The plaintiff, his clerk or servant, or some third person who has

sufficient knowledge of the facts, ought, it would seem, to make the common affidavit of debt. See 1 Wils. 339. Say. Rep. 59. S. C. 1 Bos. & Pull. 1 Chit. Rep. 58. 161. 2 Price, 332., and the late Rule of Court. And there should also be an affidavit of the service of the subpœna, and of the defendant's non-appearance.

FILIATION.—BANKRUPT. P. 287.

It has been decided that a bond given to the overseers of a parish for the support of an illegitimate child is void, and may be waved by either party at any time. Indeed, if the child were to die immediately after the execution of the bond, the obligor could recover from the obligees (the overseers), the whole amount of the bond *minus* the actual sum expended by them in the maintenance of the child.

A CONSTANT READER.

TRANSFER OF MORTGAGE.—AD VALOREM. P. 224.

1. The answer to this query appears to me to have been hastily given, without reference to the existing law upon the subject. F. T. S. refers only to 55 Geo. 3. c. 184., an act which was, as to the duties on transfers of mortgages, repealed by the 5 Geo. 4. c. 117.; and by this latter statute the *ad valorem* duty is chargeable only on the amount added to the principal money upon any transfer of the original mortgage.

H. W.

2. On the latter sum only. By the 3 Geo. 4. c. 117. § 3., transfers of mortgages are subjected to a duty of 1*l.* 15*s.*; and it is enacted, that *if a further sum of money be added to the principal money already secured, the* ad valorem *duty on mortgages shall be charged only in respect of such further money.* This statute was passed in amendment of the 55 Geo. 3. c. 184., and the answer of F. T. S. (*antè*, p. 255.), founded on the last mentioned act, is insufficient.

H. H.

QUERIES.

TRUSTEE'S LIABILITY.

A. by will bequeathed to each of his four children 600*l.*, to be paid out of his personal estate. *C.*, *D.*, and *E.* were appointed trustees to hold the legacies in trust for the children. *C.*, with the knowledge and privity of *D.* and *E.*, had the sole custody of the trust fund. *C.* and *D.* became insolvent; *E.* dies solvent. Will a Court of equity hold his personal estate liable for the whole of the legacies?

W. C.

DEVISE.—COPYHOLD.

A. died possessed of copyhold houses, which, by her will, she gave to *B.* in manner following:—"I give and devise to *B.* all my copyhold houses, &c.;" but not making any disposition of the property after *B.*'s death. *B.* has been in possession, and received the rents of the property for some time. *B.* has lately died, and his widow claims the property under *B.*'s will. This is resisted, on the ground that *A.* disposed of the property only to *B.* for his life (although she made no disposition of the property after his death); the words "and his heirs" not being in the will of *A.* To whom does the property belong?—Does it descend to the heir at law of *A.*? or does it belong to the widow of *B.*?

I. A. H.

PAROCHIAL REGISTERS.

Can any of your correspondents inform me what fees are legally due on searching and taking extracts from parochial registers of christenings, marriages, and deaths?

A. C. A.

MISCELLANEA.

CALLING TO THE BAR.

THE method of calling to the bar is now, by an act of the whole bench, at their parliamentary meeting; but heretofore every reader of the House made choice of such as he thought fit, and had power to call them to the barr: *viz.* every single reader two, and every double reader four; which is confirmed by an order of the House, made *an.* 37 Eliz.

There is no ceremony used in the calling of any to the bar, more than that their election is at the end of the parliament declared by the high treasurer to the rest of the barristers, who are then called to be informed what the Bench hath concluded on in that meeting. Their names then entred by the under treasurer; the next day, immediately before dinner, they are called to the cupboard, where the treasurer of the House, with some of the benchers assisting him, cause the parties called or elected to take the oath of supremacy, the one after the other; which being done, all is ended, and they remain utter barristers. Nevertheless, after this their call, it was not heretofore allowed them, either to wear a bar-gown openly at any bar in Westm. Hall, or to practise the law; but to forbear for the space of two years, and in the mean time to continue their exercise of mooting in the Inns of Chancery.—*Dugdale's Orig. Jurid.*

HALLS OF JUSTICES OF THE PEACE.

The halls of the justices of the peace were dreadful to behold: the screen was garnished with corselets and helmets, gaping with open mouths, with coats of mail, lances, pikes, halberds, brown bills, batter dastors, and buckles. — *Aubrey's Customs*, 1678.

BENCHERS' GOWNS.

About ninety years ago noblemen and gentlemen's coats were of the bedels and yeoman of the guards, i. e. gathered at the middle. The benchers in the Inns of Court yet retain that fashion in the make of their gowns. — *Ib.*

The Legal Observer.

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——— "Quod magis ad nos
Pertinet, et nescire malum est, agitamus."
HORAT.

ON THE THIRD REPORT OF THE COMMON LAW COMMISSIONERS.

WE are not able, at present, to take more than a general view of the numerous improvements recommended in the Third Report of the Common Law Commissioners. Without following all the details of the Report, we shall notice, principally, those points which we think are calculated to give satisfaction, or to interest the members of the profession.

LAW OF ACTIONS.

The commissioners commence their Report, by advising the continuance of the forms of action now in ordinary use, and the abolition of those which have become obsolete, or of rare occurrence. Amongst other alterations, wager of law is recommended to be abolished.

The proposed alterations in pleading are, in substance, as follow: —

1. *Of joinder of actions:*
   A mistake between trespass, and trespass on the case, shall be no ground of nonsuit, but the plaintiff may amend on terms.
   A mistake between trespass and case not to be a ground of general demurrer.
2. Of the *parties* to an action:
   The joinder of too many *defendants* shall not be fatal, and new regulations are consequently suggested as to the plea of non-joinder and replication; but it is not proposed to alter the existing rule regarding too many plaintiffs.
   The part owner of a ship, or other chattel, may maintain an action against the other part owner, &c.
3. Of the joinder of different *forms* of cation and different *rights* of action:
   A mis-joinder of different forms of action shall be ground for special demurrer only; and upon mis-joinder of different rights of action, an amendment always to be allowed.
4. Of *venue:*
   Actions relating to real property, including trespass and replevin, to be local; all others transitory.
   The new regulations as to laying the venue and its change, will remove the inconveniences which frequently arise under the undertaking to give material evidence in the county.
5. *Limitation* of time:
   Actions on specialties or records to be barred after the lapse of twenty years.
6. *Death* of parties during the action:
   After issue joined, it is proposed that the suit shall not abate by the death of either party, provided the right of action survives; and actions for injuries to land also to survive to the executor.
7. Writs of prohibition to stay waste, &c. may be issued by the Courts of law in lieu of injunctions in equity.

OF PLEAS IN ABATEMENT.

The plea of misnomer to be abolished. Appearance to be entered in the right name.

New regulations as to misnomer in process; particularly that persons may be sued by such initial letters or abbreviations as they use in signature to bills and notes.

Where the declaration is in a wrong name, the defendant may make affidavit of his right name; and if the plaintiff amend, the costs will be allowed out of the general taxation.

No greater strictness to be required in pleas of abatement than in bar. The time for pleading in abatement to be extended to eight days, and no special imparlance to be required.

OF DEMURRERS, MOTIONS IN ARREST OF JUDGMENT, &c. ERROR AND REPLEADER.

1. Demurrers and pleadings not to be filed, but delivered.
2. No rule to join in demurrer, but a demand to be made. No signature of counsel required.
3. The issue and demurrer book to be made up by the attorneys only.
4. No entry of the issue before final judgment.
5. No rule for concilium, but the cause entered on payment of 1*s*.
6. After argument of general demurrer, amendment to be allowed as of course, where the demurrer is not frivolous or vexatious.
7. Where several issues in law and fact, the former to be disposed of first.
8. When a party moves in arrest of judgment, &c. he must pay the costs of trial.
9. No error to be assigned except upon judgment of the Court below actually pronounced.

Regulations to prevent *sham demurrers*: — In lieu of mere signature of counsel, a certificate that there is probable ground in law. No rule to abide by demurrer to be necessary; and a party not to be allowed to waive a special demurrer for a general one.

Proceedings in *error*: — The Statutes of Amendment and Jeofails to be consolidated. Want of original writ, &c. not to be assigned for error.

Practice as to amendments in general to be further regulated: — Writ of error on error in *fact* not to be allowed, but made the subject of special motion. Writ of error from inferior Courts to lie either into King's Bench, Common Pleas, or Exchequer, and from thence to the House of Lords only.

Improvements suggested in the practice in error: — Writ of error to be sealed by the cursitor on payment of 1*s*. To bear teste of its true date, and to be made returnable as soon as the record can be certified. The form of the writ to be shortened, &c. The writ to be filed with the Clerk of the Errors, on payment of 1*s*.; and no allowance to be necessary. Certificate of counsel, that there is probable ground in law, to be required in order to stay execution. A bail bond, in lieu of a recognisance, for payment of amount recovered, with interest and costs. Bail to be allowed to be taken before a commissioner. Affidavit of justification to be filed. No rule to certify record. No rule to allege diminution, or to assign errors. No signature of counsel necessary. Pleadings to be delivered to the attorney, not filed; and the case set down the same as on demurrer. No entry of record to be required before final judgment. Interest upon affirmance to be allowed in all cases.

Repleader to be abolished.

MISCELLANEOUS MATTERS OF PRACTICE CONNECTED WITH PLEADING.

Practice of the several Courts to be assimilated, and an authorised book of practice to be drawn up.

Upon motions for new trials, the ground to be expressed in the rule.

Affidavits to be taken before commissioners in town, and a certain number of attorneys to be appointed for that purpose in London and its environs.

Expense of office copies to be reduced; and affidavits may be filed without the necessity of taking copies.

Rules of course to be drawn up without the signature of counsel.

Chamber business. — One of the Judges to attend in rotation, at a commodious office. Affidavits used before the Judge to be filed at the Rule Office. Power to award costs. To enforce order, it need not be made a rule of Court.

Rules to declare, plead, reply, &c. to be discontinued, and four days' demand made.

The times for declaring, pleading, replying, &c. are also proposed to be altered.

A general rule established for computing times for pleading, replying, &c. — the first day exclusively, and the last inclusively, besides Sundays.

Rule to abide by plea discontinued.

No pleadings to be signed by counsel.

Profert and *oyer* of all written instruments which a party has occasion to plead, and where the same are presumably in his possession.

Regulations to prevent sham pleas, by requiring affidavit of verification.

Instead of ruling the plaintiff to enter the issue, the defendant's attorney to serve four days' notice.

Judgment as in case of nonsuit to be obtained before a single Judge.

The passing of the nisi prius *record* to be discontinued.

IMPROVEMENTS OF PLEADINGS IN PARTICULAR ACTIONS AND PLEAS, VIZ.

Assumpsit, and debt on simple contract; in debt on specialty and on penal statutes;

in covenant, trespass, trespass on the case, detinue, replevin, and ejectment; and in mandamus and prohibition, quare impedit, and scire facias; also in actions by and against executors and administrators.

In case of set-off, it must be pleaded, and not given in evidence under the general issue; and the defendant may take judgment for the excess.

Bankruptcy to be pleaded.

Plea of foreign attachment and justification under judicial process to be pleaded in a summary form. So of the jurisdiction of a Court of Requests.

INTERLOCUTORY JUDGMENT.

Interlocutory judgment to be signed in *debt*, except in debt on bond, judgment, or recognisance; and the amount assessed as in other actions.

In all actions on bills, notes, checks, awards, and money covenants, where interlocutory judgment is obtained, the officer of the Court to compute, and without any rule for the purpose.

In proceeding under 8 & 9 W. 3. c. 11. the assessment of damages upon interlocutory judgment to be before the sheriff, instead of the Judge of assize or Nisi Prius, unless otherwise ordered.

PRACTICE CONNECTED WITH TRIAL BY JURY.

No writs of venire, distringas, or habeas corpora juratorum, to be issued in any cause to be tried by a common jury.

Only one special jury panel, as well as one common jury panel, to be returned for the same assize; and no writs of venire, distringas, or habeas corpora, to issue.

No fee to be payable to special jurors for their attendance. No person to be again returned as special juror who has served within a certain period. Peremptory challenges of jurors to be allowed. To prevent vexatious recourse to a special jury, a Judge's order to be obtained, founded on an affidavit.

Provision to be made for entering causes for trial in counties, where expedient, some time before the commission day.

Remanet fees to be abolished.

New regulation as to speeches of counsel, &c. at the trial.

After twelve hours' deliberation, the jury to be discharged; and the verdict of nine jurors, after such period of deliberation, to suffice.

After this outline of the principal parts of the Report, which will enable our readers to form a judgment of its practical utility, and the comprehensive views entertained by the commissioners, we have but few observations to submit.

We would, however, particularly direct the attention of the general practitioner to those parts of this valuable publication, which recommend the abolition of many of the fees of the common law offices, and the reduction of others. It will be observed, that the sum total of a bill of costs will thus be materially reduced, and both the client and the attorney will be evidently benefited.

Amongst the items of reduction to which we allude are the following:—

The pleadings, instead of being filed, and the expense of office copies incurred, are to be delivered by one attorney to the other.

The proceedings are not to be entered on record till final judgment; so that in case of an intermediate settlement, that expense will be avoided.

The paper and demurrer books are also to be made up by the attorney.

The large fees on passing *nisi prius* records are to cease; and so are remanet fees.

The charge for office copies, where required, to be reduced; and affidavits may be filed without the necessity of paying for copies.

Instead of an expense of nearly 4*l.*, writs of error are to be sealed and filed for 2*s.*, and the pleadings prepared by the attorneys.

Here we may perceive "the pruning-knife" in very active exercise, not only amongst the branches, but the roots of corruption. Indeed, the legal drones, like the riches they have hitherto inherited, must "make unto themselves wings and fly:" the time is approaching when there will be no resting place for them, and the hive will be tenanted only by the industrious bees.

In taking, for the present, a cursory glance over this Report, we are impressed with the attention which has been bestowed on the convenience of the multitude of suitors of the several Courts, who are engaged in commercial pursuits and to whom the *saving of time* is of the greatest importance. With this view it is recommended that attorneys in different parts of the metropolis, and its environs, be appointed to take affidavits in the same manner in which they are authorised in the country.

The plan recommended for the despatch of business before a Judge at chambers is

calculated, in many respects, to be highly advantageous: especially as it will be the means of assimilating the details of practice in the three Common Law Courts. Amongst other benefits, it will abate the nuisance of the present *locus in quo* of that large department of professional business. There will be an end of the "pest-house" chambers in which hundreds meet far more closely than they will meet in the grave; and the abomination of "sham bail" will exist no more. How any of the Judges could so long breathe as they have in such an atmosphere is more than marvellous.

It being somewhat our province to deal with the merits of new books, we pause in pronouncing on the expediency of "an authorised book of practice." We know the ancient reporters of the decisions of the Court were duly appointed to their vocation; and that in recent times some of the recorders of the wisdom of the Bench receive a superintending assistance; but we are not prepared to say that these precedents can be usefully carried into the details of a practical compilation, to the exclusion of all others. But the subject deserves consideration.

We shall, without delay, continue our remarks on the various important suggestions of the learned commissioners, which on the whole we incline to support; and, certainly, both for its matter and skilful composition, the Report deserves the most patient and respectful perusal of every member of the profession.

NEW BILLS IN PARLIAMENT.

DECREES IN EQUITY.

Analysis of a Bill intituled An Act for the better Execution of Decrees and Orders made in the Courts of Chancery and Exchequer in England and Ireland respectively.

The bill recites, that by the 41 Geo. 3. c. 90., for the more speedy and effectual recovery of debts due to his Majesty, and for the better administration of justice, and also by the 5 Geo. 4. c. 111., certain provisions are made respecting the execution in Ireland of decrees and orders made by the High Court of Chancery and Court of Exchequer in England, and respecting the execution in England of decrees and orders made by the High Court of Chancery and Court of Exchequer in Ireland, and for causing process against the person of the party against whom such decrees or orders respectively shall have been made to issue, in order to enforce obedience to and performance of the same; and that it is expedient to extend the provisions of the said acts so as to enable the said Courts of Chancery and of Exchequer in England and Ireland respectively to issue process, *not only against the person, but also against the lands* of the party against whom such decrees or orders respectively shall have been made.

It is therefore proposed to be enacted as follows:—That in all cases in which by such statutes the Courts of Chancery and Exchequer of England and of Ireland, are enabled to issue process against the persons of the parties therein mentioned, it shall be lawful to issue process against the lands of the parties against whom such decrees or orders respectively shall have been pronounced, and to appoint receivers over the same (in like manner as they are now enabled under the provisions of the said acts to issue process against the person).

And reciting, that great inconveniences and delays of justice result from the defect of jurisdiction in the said Courts of equity to enforce appearances and answers: it is therefore proposed to be enacted, That the Courts of Chancery and of Exchequer of England and of Ireland respectively may order that service in any part of the United Kingdom of Great Britain and Ireland, and in the Island of Man, respectively, of any subpœna or letter missive, and of all subsequent process upon any defendant, then residing in such part of the said United Kingdom or Isle of Man in which he shall be so served, shall be deemed good service upon such defendant, upon such terms, and in such manner, and at such time, as to such Courts respectively shall seem reasonable.

PRACTICAL POINTS OF GENERAL INTEREST.

No. IX.

WHAT DEBTS NEED NOT BE INCLUDED WITHIN PROBATE DUTY.

In this case, it appeared that Mr. Curtis was a lessee under the Duke of Portland, and that the plaintiff was his under lessee. The probate duty upon proving Mr. Curtis's will had been paid upon 2000*l.*; but it appeared, that the property of the testator would have amounted to more than 2000*l.* if a debt due to him from Messrs. Marsh and Co. had been included; and also a debt which had been received by instalments. Messrs. Marsh and Co. had become bankrupts. It was objected, that these debts ought to have been included in the amount for which the probate duty was paid.

Sir *J. Scarlett* and *R. V. Richards, contrà*, argued, that in calculating the amount of probate duty, bad and doubtful debts ought not to be included.

Denman A. G., *F. Pollock*, and *Godson*, for the plaintiff, contended, that the probate duty was payable upon the gross amount of the property, without making any deduction for doubtful debts, as there

was a power given to the commissioners to return the duty if too much had been paid.

Lord *Tenterden* C. J. Are you not to deduct the desperate debts? The debt due from Marsh and Co. was clearly desperate; and the other debt might not have been received.

F. Pollock. I submit that no deduction can be made in the first instance. With the policy of the law we have nothing to do. The act of parliament requires that the probate duty should be paid on the gross amount of the property to which the testator appears to be entitled at his death, without any deduction for his liabilities; and consequently he is not to exclude debts which may be received.

Lord *Tenterden* C. J. I think that desperate and doubtful debts need not be included; and that the executor has a right to exercise his judgment fairly and *bonâ fide*, whether the debt is doubtful or bad.—*Moses* v. *Crafter*, 4 C. & P. 524.

REMARKABLE TRIALS.

No. VI.

LADY WARRISTON'S CASE.

The story of the young Lady Warriston is short and melancholy. She was a daughter of Livingstone of Dunipace, a courtier and a favourite of James VI. An ill-assorted marriage united her at an early age with the Laird of Warriston, a gentleman whom she did not love, and who apparently used her with brutal harshness. The Lady Warriston accused her husband of having struck her several blows, besides biting her in the arm; and conspired with her nurse Janet Murdo to murder him. The confidante, inspired with that half-savage attachment which in those days animated the foster child and the nurse, entered into all the injuries of her dalt (*i. e.* foster daughter), encouraged her to her fatal purpose, and promised to procure the assistance of a person fitted to act the part of actual murderer, or else to do the deed with her own hands. In Scotland, such as we have described it, such a character as the two wicked women desired for their associate was soon found, in a groom called Robert Weir, who appears, for a very small hire, to have undertaken the task of murdering the gentleman. He was ushered privately into Warriston's sleeping apartment, where he struck him severe upon the flank-vein, and completed his crime by strangling him. The lady, in the mean time, fled from the nuptial apartment into the hall, where she remained during the perpetration of the murder. The assassin took flight when the deed was done, but he was afterwards seized and executed. The lady was tried and condemned to death on the 16th of June, 1600. The nurse was at the same time condemned to be burnt alive, and suffered her sentence accordingly; but Lady Warriston, in respect of her gentle descent, was appointed to die by the Maiden, a sort of rude guillotine, imported, it is said, from Halifax, by the Earl of Morton, while Regent, who was himself the first who suffered by it. The printed account of the beautiful murderess contains a pathetic narrative of the exertions of a worthy clergyman (its author) to bring her to repentance. At first his ghostly comfort was very ill received, and she returned with taunts and derision his exhortations to penitence. But this humour only lasted while she had hopes of obtaining pardon through the interest of her family. When these vanished, it was no longer difficult to bring her, in all human appearance, to a just sense of her condition; her thoughts were easily directed towards heaven, when she saw there was no comfort upon earth. It is not for us to judge of the efficacy of repentance upon a death-bed, or at the foot of a gibbet. Lady Warriston's, like that of other criminals, had in it a strain of wild enthusiasm, such as perhaps an assistant may be very naturally tempted to sympathise with. It must indeed seem astonishing with what tenacity a wretch, condemned to part with life, clings to the sympathy of his fellow-mortals, and how readily he adopts the ideas suggested by those who administer the most grateful flattery, if it can be called so, by continuing to express an interest in his desolate condition. Hypocrisy is daily resorted to in cases where it seems utterly useless; nay, it is common to see those, who are under sentence of death for acknowledged crimes, load their souls with deliberate falsehood, only for the purpose of lessening their criminality, in a very small degree, in the eyes of the world they are about to close their eyes upon for ever. Spiritual emotions may be, in like manner, feigned and fostered for attracting the approbation or sympathy of a spiritual guide. In all such cases, therefore, as Mr. Sharpe justly concludes, a confessor ought to be severely cautious how he misleads his penitent with too sure a hope, or presents him to the multitude rather as one laying down life

like a martyr than a criminal; and in none such can it be safe or decent to follow the example of the Lady Warriston's reverend assistant, who did not hesitate to term his penitent a saint, though the blood of her husband had hardly been washed from her hands.*

ON THE LAW OF BAILMENT.

DIFFERENCE OF OPINION BETWEEN LORD CHIEF JUSTICE HOLT AND SIR WILLIAM JONES.

When two authorities so deservedly respected as those of Lord C. J. Holt and Sir Wm. Jones disagree, it is worth our labour to enquire into the reason and merits of their variance. That to which I allude, is contained in their classification of the several species of bailment, and is of the more importance, because the celebrated judgment of the former in *Coggs* v. *Barnard*, Raym. 909., and the ingenious treatise of the latter, are referred to as the principal sources of information on that head of law.

In the above mentioned case Lord Holt tells us, that "there are six sorts of bailment, which lay a care and obligation on the party to whom goods are bailed, and subject him to an action if he misbehave in the trust reposed in him.

"1. A bare and naked bailment to keep *for the use of the bailor*, which is called *depositum*.

"2. A delivery of goods which are useful, to keep, called *accommodatum*, which is a lending *gratis*.

"3. A delivery of goods for hire, which is called '*locatio*,' or '*conductio*.'

"4. A delivery by way of pledge, called '*vadium*.'

"5. A delivery of goods to be carried *for reward*.

"6. A delivery of goods to do some act about them (as to carry) *without reward*, which is called '*mandatum*.'

Sir William Jones, in his Essay on the Law of Bailments, p. 55., says, that Lord Holt's division is inaccurate; for his fifth sort is only a branch of his third; and that he might with equal reason have added a seventh, since his fifth is capable of subdivision. Sir W. Jones acknowledges only five sorts, viz.

1. *Depositum* — the same as Lord Holt's first class.

2. *Mandatum* — the same as Lord Holt's sixth class.

3. *Commodatum* — the same as Lord Holt's second class.

4. *Pignori acceptum* — the same as Lord Holt's fourth class, or "*vadium*."

5. *Locatum* or hiring. And this is either *locatio rei*, by which the hirer gains the temporary use of the thing: or *locatio operis faciendi*, when work and labour, or care and pains, are to be done and bestowed on the thing delivered: or *locatio operis mercium vehendarum*, when goods are bailed for the purpose of being carried from place to place, either to a public carrier or a private person.

Now I prefer Lord Holt's division to that of Sir William Jones, who seems to me, although so great a linguist, to have confused himself with the ambiguous meaning of the Latin word *locatio*. In every instance of bailment *with reward*, either the bailee pays the bailor for the temporary use, or the bailor the bailee for his care in keeping, conveying, &c. It is obvious that these two cases, viz. that in which the bailee keeps and pays, and that in which the bailee keeps and is paid, are distinct, and the converse of each other. Now the *locatio operis faciendi* and the *locatio operis mercium vehendarum* belong to the latter class: for instance, cloth is bailed to a tailor to make a coat; the tailor is the bailee, and receives payment from the bailor, his employer: goods are bailed to a carrier; the carrier is the bailee, and *is paid* in this instance also by the bailor. But the *locatio rei* is very different in its circumstances, and falls under the former of the two classes of which I have spoken, viz. that in which the bailee pays a consideration to the bailor: take the example of a horse let out for a day; here the rider of the horse is the bailee, and *pays* a sum of money to the *bailor*, the owner. But the truth is, that Sir W. Jones was deceived by the ambiguous meaning of the term *locatio*, which is used by Roman authors in two precisely opposite senses as far as the doctrine of bailments is concerned: First, that of conferring a temporary ownership on another for reward; Secondly, that of receiving one, in order to act, while such owner, in a particular manner, in consideration of a reward. *Locatio ædium* is an instance of the former, *locatio operis faciendi* of the second.

I said the Roman authors used the word *locatio* in two opposite senses, as far as the doctrine of bailments is concerned;

* From an article in the Quarterly Review for February, 1831, written, it is said, by Sir Walter Scott.

and this qualification is important, for in other respects their use of it was congruous. Thus *locatio ædium* is the agreeing *to put another* in temporary possession of a house, for reward: *locatio operis circa vestes adhibendi* is, the agreeing *to receive* temporary possession of garments for reward, with the design of stitching them when in such possession. This is the expression of their meanings as far as concerns bailment, which, be it observed, is the act of handing property from one's-self to another *pro tempore*. But the primary meaning of the word "locare" is, *to hire*, and of "locatio," a *hiring*; and in that sense "locatio ædium" means the hiring of a house; "locatio operis circa vestes adhibendi," the hiring of one's own labour to be employed in stitching garments. But though manual labour may be the subject of a hiring, yet it never can be so of a bailment. And as Sir William Jones was treating upon bailments, not on hirings, he should have used the word "locatio" not in its general sense, but in the meaning which it bears when considered with a view to bailment.

If these ideas be just, it will appear that Lord Holt's separate classification of *locatio rei* and *locatio mercium vehendarum* was perfectly correct and necessary. An author wishing to classify any particular action, usually assumes an individual, for instance *A.*; he next considers in how many different ways it is possible for *A.* to perform the act in question; and each several method of performing it he sets down as a several class. Let us apply this rule to the classification of Lord Holt and Sir William Jones.

Lord Holt's method stands thus: —

Cases in which a bailment may take place. Where,

1. *A., neither rewarded nor rewarding*, bails goods to *B.* to keep for him.

2. *A., not rewarded*, bails goods to *B.* to keep for his own use *pro tempore*.

3. *A., rewarded*, bails goods to *B.* to keep for his own use *pro tempore*.

4. *A.*, bails goods to *B.* by way of pledge.

5. *A., rewarding*, bails goods to *B.* to carry for him.

6. *A.*, neither rewarding nor rewarded, bails goods to *B.* to do some act upon for *A.*'s advantage.

Sir William Jones's method: —

1. The same as Lord Holt's first class.

2. The same as Lord Holt's sixth class.

3. The same as Lord Holt's second class.

4. The same as Lord Holt's fourth class.

5. Where *A., rewarded*, bails goods to *B.* to keep for his own use *pro tempore*. Where *A., rewarding*, bails goods to *B.* to do some act on them for *A.*'s advantage. Where *A., rewarding*, bails goods to *B.* to carry for him.

Who does not remark that Sir William has confounded in his fifth class three instances, in two of which *A.* is the person *rewarding*, and in the third the person *rewarded*; a confusion the more remarkable, inasmuch as many authors of authority use the absence or presence of reward as a criterion whereby to distinguish among the various responsibilities of bailees. 1 Inst. 89. *Rogers* v. *Head*, Cro. Jac. 262. *Gisborne* v. *Hurst*, Salk. 249. In conclusion, let it be remarked that Sir W. Jones's enumeration of *locatio operis faciendi* and *locatio mercium vehendarum* is too diffuse, the latter being a branch of the former: as Lord Holt's fifth class is too contracted, since it admits only the species, and excludes the genus. It should be co-extensive with his sixth, differing only in the presence of a reward.

†

DISPUTED DECISIONS.

No. VI.

LORD TENTERDEN'S ACT, 9 GEO. 4. c. 14.

THE decision in *Lochley* v. *Maund*, at the Rolls, *antè*, 285., appears to be severe upon the plaintiff, in making him pay a portion of the costs after succeeding in his suit. It is clear that the Statute of Limitations does not run against a trust; *Burke* v. *Jones*, 2 V. & B. 275; *Hughes* v. *Hughes*, 1 Turn. 307., where the Master of the Rolls said, "The question is, how the debt stood at the death of the testator." And upon principle, it is immaterial whether the trust be created by the original debtor, or by the person whose duty it is to pay, or annexed to his office by law, as an assignee under a commission of bankrupt. *Exparte Ross*, 2 G. & I. 330.

This was the case of an administrator, who is sworn to pay the debts of the testator. The date of the trust-deed is not given, nor is it expressly stated in your note of the case to be a creditor's suit; but assuming that it was, or even if it was not, *Slemdale* v. *Hankisson*, 1 Sim. 393., is in point to show that the operation of the statute was suspended by the filing of the bill; and therefore, with submission, the principle of Lord Tenterden's Act, which is merely supplementary to the statute,

did not apply, inasmuch as the operation of the latter had ceased in equity before the debt was barred at law; and in *Sirdefield* v. *Price*, 2 Yo. & Jer. 73., the Court would not allow the statute to be pleaded as a bar to the plaintiff in respect of certain notes to which it did not accrue till after the filing of the bill, although the Court had so much doubt respecting the validity of the claim, that it retained the bill for a year, to enable the plaintiff to support it by an action at law. *

C. S.

DELAYS AT THE STAMP OFFICE, SOMERSET HOUSE.

To the Editor of the Legal Observer.

Sir,

Having frequently observed the interest you take in any proposition likely to be beneficial to the legal profession, I beg leave, through the medium of your valuable publication, to make some observations respecting the clerks employed in the Receiver-General's Office, at the Stamp Office department at Somerset House.

The delay occasioned through the inattention, or rather negligence, of the clerks employed in that office, is very great, and is frequently productive of great inconvenience to the profession, more particularly to those not residing in the metropolis: I allude to the length of time which we are kept waiting in the Receiving Office before the clerks send down the warrant, which ought not to occupy them more than two or three minutes. Instead of which we are sometimes detained for upwards of half an hour. Is it not monstrous that these individuals, every minute of whose time ought to be occupied in attending to their duties, should be permitted to read the newspapers, and otherwise waste their time, at the expense and inconvenience of those who attend to pay a very burdensome imposition?

As you are, Mr. Editor, a zealous advocate for rectifying the abuses which exist, I trust you will not fail to notice this, as I am confident numerous others connected with the profession have witnessed the neglect I complain of, and can testify the truth of these observations.

I remain, Sir, your obliged reader,

H. B. A.

SUPERIOR COURTS.

LORD CHANCELLOR'S COURT.

DEBTS. — WILL. — STATUTE OF LIMITATIONS.

Where a testator, thinking he has a freehold estate, but really having a leasehold, charges his debts on his estate, the charge will prevent the effect of the statute of limitations as to the debts.

This was an appeal from a decision of the Master of the Rolls. The facts of the case were as follow: — A Mr. Donovan, being indebted in the sum of 260*l*., made his will in 1815, and died in 1816, the will charging his debts on his estate, which he deemed a freehold. He meant that his debts should be paid; they were not then barred by the statute of limitations, nor at the time of his death, but they were before this suit was brought. The questions were, whether the words in the will changed the nature of the property; — whether they made it a trust for the creditors. The clause in the will amounted to a declaration by the testator that his will was, that the statute should not run against his creditors, and it would have kept the debts alive if his estate had actually been real. There was another circumstance noticed by the Master of the Rolls, namely, that after the decease of Mr. Donovan, his daughter published an advertisement for all creditors to come in and prove their debts. There was a case in Finch's Precedents, where it was reported that Lord Harcourt had decided that where a debt had been due more than six years, yet if the debtor put forth an advertisement that all his creditors will be paid, it amounts to an acknowledgment of the debt. In the next paragraph, however, he could not agree; and altogether that authority was not of sufficient weight to be conclusive. At common law, a bare acknowledgment would take the case out of the statute; and that acknowledgment had been granted to be so slight, and so many things had been construed an acknowledgment, that Lord Erskine had pleasantly said, that if a man asked for payment of a debt after the time of limitation, the only safe answer was to knock him down and run away. It was held in the case of *Fenton* and *Trueman*, that at law it was sufficient to take the debts out of the statute, if a clear intention was shown by the debtor of doing so. If the intention alone were sufficient, he must take the meaning of the testator to be as he had expressed, by directing payment out of his real estate. Would he have made any difference, had he known it was leasehold? His intention was evident, and it was of no consequence if he had made a mistake as to the nature of his estate. Another view of the case was, that in construing a will the Court was bound to attend to the meaning of the testator; and if his words were not to be deemed a charge upon his personal estate, what did the clause mean? It was rational and intelligible, if it meant that he did not intend the statute to run, and that he did not wish to take advantage of the unconscientious plea of the statute of limitations. If he did not mean that, then he was only saying, I desire that to be done which the law would do of itself. But the rule in construing wills was to presume that the party had some meaning, and his Lordship could see no meaning but that which he had stated. The case, however, had been put chiefly on the ground that the testator created a trust in favour of his cre-

* I have not noticed above, the principle, "that equity follows the law;" if it had applied here, the plaintiff ought not to have recovered at all.

ditors, and, as between the trustees and the *cestui que trusts* no time would run. In deliberating on the present case, he had consulted a most venerable authority, who was of the same mind with himself upon the point. If the debt had been paid, evidence might be produced of the fact. His Lordship had felt bound to come to a decision contrary to that of the other Court; nevertheless the case was not free from doubt. There would be no difficulty as to the future effect, because men would know what the law was before they inserted such a clause. There was some difficulty, however, as to wills already made. It was rather retrospective than prospective. On these grounds, considering the importance of the rule, and the doubts entertained on the question, it would be satisfactory, if the estate could bear the expense, that the matter should be reconsidered in another place, where it should have early attention, and the best assistance that equity and law could afford. — *Jones* v. *Scott*. June 29. 1831.

NE EXEAT REGNO.

A writ of ne exeat regno *will not be granted on the mere belief that a person is going to leave the kingdom; there must be some fact to evidence the intention.*

This was a motion by Sir *Edward Sugden*, (with whom was Mr. *Purvis*,) to discharge an order of the Vice Chancellor, for a writ of *ne exeat regno* against the above defendant. A decree had been lately pronounced against him by the Master of the Rolls, in a suit instituted in this Court; and upon the surmise that he was going out of the country to avoid the payment of money ordered by the decree, the order for the writ was obtained. It was contended that the writ of *ne exeat regno* ought not to issue. The affidavits upon which it was ordered by the Court below were extremely unsatisfactory. They did not contain one fact from which it could be concluded that this gentleman was about leaving the kingdom, nor did they contain any positive assertion of such intention, but went totally upon the belief and information of the deponents. One of the affidavits spoke of milliners being engaged in preparing dresses for the defendant's daughters previous to their departure to New York. But it could not be inferred by this Court, that because the daughters were sent to America, the defendant himself intended to go. Another affidavit stated the fact of a gentleman, who was in search of a house for purchase, being referred to the one in which the defendant resided at Clapton, and which was said to be for sale. In opposition to these affidavits, he relied upon that of the defendant himself, who swore positively that he had no intention whatsoever of going out of the jurisdiction of this Court. The learned counsel referred to the cases which supported his argument, that this Court never granted this high prerogative writ, except upon clear and positive evidence that the individual was about to take himself out of the jurisdiction of the Court. It was similar to a *capias* to hold to special bail at common law, which a Judge in chambers would order to be quashed unless the debt were positively sworn to.

The *Solicitor-General* and Mr. *Rolfe* were heard in support of the order for the issue of the writ. The sending of his three daughters to New York was evidence of this gentleman's intention to take himself there. He had been all his life residing in the West Indies up to 1821, and had no tie on him now in this country, his wife being dead. The affidavit of the house being advertised for sale also showed the intention of this person.

The *Lord Chancellor* was of opinion that this writ ought not to issue. It was formerly a high prerogative writ, and used only for purposes of state. Formerly the swearing to the belief of a person's intention to depart from the kingdom was deemed sufficient for granting the writ. In addition to the cases cited, his Lordship referred to the observations of Mr. Justice Buller, upon an occasion of his sitting with the Lord Chancellor upon an application of this sort. That learned Judge, well informed on matters of equity as well as law, said that an affidavit stating, upon the deponent's belief, that the defendant was about to leave the kingdom, was not showing enough for granting this writ. There must be something more than belief. Lord Eldon, in the case of *Jones* v. *Adephesin*, 16 Ves. 470. said he would not grant this writ, nor a writ of injunction upon the swearing as to one's belief and information; there should be some fact sworn, to evidence the defendant's intention of leaving the kingdom. There was nothing positive in these affidavits in support of this order. His Lordship never witnessed so much hearsay evidence in any affidavits. The defendant's affidavit, on the contrary, was positive enough, and such as an indictment for perjury could be founded upon if he should leave the country; — if even he should go off within a reasonable time, a jury would infer his intention of going when he made this affidavit, and would find him guilty of perjury. If the defendant had made any declaration, or written a letter, or done any one act to evidence his intention of taking himself out of the jurisdiction, the Court would continue the order for the writ; but in the absence of any thing of a positive nature the order should be discharged. — —— v. *Palache*. L. C. June 28. 1831.

ROLLS COURT.

TRUST. — PARTNERS. — COMPOSITION DEED.

If trust moneys are embarked in trade by one partner with the knowledge of the others, the latter are liable to the cestui que trusts.

Although the cestui que trusts *signed a composition deed, if they were ignorant how it affected their rights, they will not be barred of their claim against all the partners.*

In this case Israel Moravia, the testator in the cause, died in the year 1816, leaving his niece, the plaintiff, and other legatees him surviving, and having made a will appointing his nephew George Moravia his trustee and executor. George Moravia was a partner in a commercial house with the defendants: the business was carried on in England and Jamaica,

in separate concerns; and the trust moneys left to George Moravia, as trustees were employed by him in the part of the concern which was carried on in England. This branch of the partnership trade had turned out unfortunate, and a deed of composition with the creditors of that branch was proposed, to which they all, with the exception of a person named Cohen, had agreed to accede. Cohen, however, determined to make the branch in Jamaica answerable for his demands; and in order to prevent Cohen from obtaining any advantage over the other creditors, it was arranged that actions should be commenced, and judgments entered up in their names, against the concern in Jamaica. This being done, it appeared that the partnership was indebted to the estate of the testator in the sum of 49,750*l.* The defendants, having been cognisant of the employment of this sum in their business, were aware that they were liable to refund it; and placed a sum to that amount in the hands of George Moravia, who engaged to pay the legacies bequeathed by the testator, and to enter up satisfaction on the judgments given to them. He did not pay the plaintiff, having afterwards become bankrupt. The plaintiff, being then twenty-three years old, had signed the deed of composition, and the present bill was filed against the defendants to recover her legacy.

The *Master of the Rolls* said that the case was one of much hardship, but he must be guided by the established principles of equity. The defendants, having been cognisant of the employment of the trust moneys in the partnership, were liable to restore it; and when they paid over the sum of 49,750*l.* to George Moravia, two questions arose:—Did the plaintiff participate in the agreement then made between the parties? She was no party to that agreement, nor had received any advantage from it. But was not her demand cancelled by the deed of composition which she had signed? She had received no consideration for her execution of it; and as it did not appear that she had received information as to the manner in which that instrument would affect her rights, the Court would consider that she had been taken by surprise in its execution. The claim of the plaintiff was therefore established.—*Williams v. Palache and another.* M. R. June 7. 1831.

BEQUEST.—TRUST.

When a person, being ill, directs, in writing, that a sum of money shall be subject to certain trusts, and delivers it to one of the trustees, and also gives a draught for the sum on his agents, and dies before the money is received, the money will be subject to the trusts contained in the memorandum in writing.

In this case the testator, being in a precarious state of health, but not considering himself in extreme danger, had written what was called in the pleadings a memorandum, or paper in which he created certain trusts with respect to a sum of money then in the hands of Messrs. Cox and Greenwood, being the produce of his commission in the army, which he had requested them to sell. This memorandum was delivered by the testator to his nephew, one of the trustees named in the paper; and, at the same time, a draught upon Messrs. Cox and Greenwood was put into his hands, authorising him to receive the money, and apply it upon the trusts stated in the instrument. This took place at St. Germain; and the nephew having immediately left France, proceeded to England, presented the draft, and received the money; one of the other trustees being a party to the receipt. It so happened, however, that the testator had died twenty-four hours before the money had been actually received; and the question in this case was, whether the sum so received was to be considered as part of the personal estate of the testator at his death, or subject to the trusts expressed in the memorandum. In a case before Lord Rosslyn, a testator had written a draft, and delivered it to another person as a gift, in order to receive a sum of money; the draft, however, was not presented till after the death of the testator was known to the banker, who refused to pay the money; and it was held, that, in these circumstances, there could be no doubt that the party to whom the draft was delivered could make claim against the estate. The opinion, however, was then expressed by his Lordship, that if the draft had been paid by the banker before notice of the testator's death, no Court could recall it as part of his estate. Upon the principles, therefore, of these cases, the *Master of the Rolls* was of opinion, that the sum of money in question did not continue part of the testator's personal estate, but was subject to the directions and trusts of the memorandum aforesaid.—*Hughes v. Warmsley.* M. R. June 21. 1831.

VICE-CHANCELLOR'S COURT.

INJUNCTION.—MAP.

The publication of a spurious map by the agent of the inventor will be restrained.

Mr. *Spence* applied to the Court for an injunction to restrain the defendant from publishing and selling a spurious map of the canals and rail-roads in England, and purporting to be that published by the plaintiff. It appears that the plaintiff, whilst proceeding to publish a map of that character, had engaged the defendant to collect the names of subscribers for the work. The defendant obtained several subscribers for the work. Previous to the completion of the plaintiff's work, the defendant took advantage of his knowledge of the plaintiff's design, and published the spurious map in question, of which he delivered copies to those persons who had subscribed for the plaintiff's map, telling them, at the same time, that the map he produced was the one they had subscribed for, and in several instances he had received the money for his map. Under these circumstances it was that the plaintiff sought this injunction. Affidavits were read in support of his application.

The *Vice Chancellor* granted the injunction. This injunction has been subsequently dissolved. —*Nichols v. Loder.* V. C. July 1. 1831.

COURT OF KING'S BENCH.

SERVICE OF PROCESS ON BOUNDARIES OF A COUNTY.

The affidavit for setting aside process, on the ground of its being served in a wrong county, must state expressly that the place where the service took place is not on the confines of the county into which the process issued.

Follett showed cause against a rule obtained by *Alexander*, for setting aside the service of a bill of Middlesex, at 118. Chancery Lane, in the city of London. No affidavit had been produced that there was no dispute as to boundaries between the county of Middlesex and the city of London. Now, there was a dispute, and had long been one, as to the boundaries between those two places in Chancery Lane. In *Storer* v. *Rayson*, 3 B. & C. 158., the Court refused to set aside the service of a *latitat* served in a wrong county, without an affidavit that the place where it was served was not on the confines of the county into which it was issued. It had become the established practice of the Court to require an affidavit, swearing that there was no dispute as to the boundaries between the two places.

Alexander, contrà, cited *Chase* v. *Joyce*, 4 M. & S. 412., and *Hammond* v. *Taylor*, 3 Barn. & Ald. 408., to show that it was merely necessary to swear in the affidavit that the house itself, at which the service was, was not in the county into which the process had been directed. If that were out of the place into which the process was directed, the service was clearly irregular. It must be unnecessary to state that there was no dispute as to the boundaries of the county in such a case. If it were necessary, then this difficulty would constantly arise, namely, at what distance a house must be from the boundaries of a county, in order to render such an affidavit necessary. The house might be forty or fifty miles from the boundary, and still it would be necessary to make that affidavit. In the present case there was no doubt that the house in which the process was served, was in the city of London. There could, therefore, be no occasion for such an affidavit.

Taunton J. I think I am tied down by the last case. It must be stated in terms in the affidavit, that the place where the process was served was not on the confines of the county into which the process issued. The rule must therefore be discharged.*

Rule discharged.—*Anon.* E. T. May 2. 1831.

NON PROS.—WAIVER.—NULLITY.—PLEA IN ABATEMENT.

If a plea in abatement be a nullity, the plaintiff cannot waive it.

If money be paid after judgment signed, it cannot be considered as a voluntary payment.

Kelly showed cause why the rule to reply, and judgment of *non pros.* signed, should not be set aside, and the sum of 8*l.* paid in consequence refunded. It was an action for a small sum of money. The plaintiff had declared, and the defendant pleaded in abatement. In the affidavit it was stated, that "the *affidavit* hereunto annexed," instead of "the *plea*," is true. There was no other informality. The plaintiff afterwards amended his declaration. The defendant then ruled the plaintiff to reply; and the plaintiff not having replied, the defendant signed judgment of *non pros.*, and 8*l.* costs were paid by the plaintiff to the defendant. Now, if the plaintiff had chosen, he might have treated the plea as a nullity; but having proceeded in the cause, by taking out a summons to amend, it was now too late for him to take advantage of it. He had, in fact, waved the irregularity in the plea. The payment of the money too, being voluntary, was also a waver. He cited *Bray* v. *Haller*, 2 B. Moore, 213., in which it is decided, that if the affidavit of the truth of a plea in abatement be insufficient, the Court will not set aside the plea, as the plaintiff might have treated it as a nullity, and signed judgment.

Platt contrà. The ground on which this rule was moved was this, that the plea put on the file was a nullity. Now, by the statute of the 4 & 5 Ann. c. 16. § 11., it is enacted, that "no dilatory plea shall be received in any Court of Record, unless the party offering such plea do, by affidavit, prove the truth thereof, or show some probable matter to induce them to believe that the fact of such dilatory plea is true." There was nothing here to show that the plea was true. There was, in fact, no plea at all on the file. Then the defendant taxed his costs, and threatened to take out execution if they were not paid. Now, he would not have been entitled to costs at all, if the plaintiff had entered a *cassetur billa*. He must therefore refund them. It is said, we have adopted the plea by applying to amend our declaration. But amending a declaration is not like a step in the cause; for it may be amended at any time before the trial. The payment of money is no waver of our objection, for we paid it under duress.

Taunton J. I give no opinion upon the last point, as to costs. But I am of opinion that, under all the circumstances of the case, this judgment of *non pros.* was improperly signed. And the ground of my opinion is, that the statute of Anne is peremptory. An affidavit of the truth of all dilatory pleas is required by that statute, and no affidavit was here filed. There is no authority to show that it must not be considered as a nullity. If it is a nullity, I apprehend the plaintiff is under no obligation to reply. And the rule to reply to a nullity he was not bound to act upon. I think, therefore, that in this case no judgment should have been filed for not replying. There is this difference between an irregularity and a nullity: an irregularity may be waved, but a nullity cannot. It is not in the power of a party to wave it. As the act of parliament declares it to be a nullity, the Court is to judge of it. This money appears to me to have been paid under duress of an immediate execution being put into his house. I do not go upon what the clerk is supposed to have said,

* See also —— v. *Walters*, 1 Chit. Rep. 14.; *Swiss* v. *Williams*, Ib. 15.; *Storer* v. *Rayson*, 4 D. & R. 739.; *Williams* v. *Gregg*, 7 Taunt. 333; 2 Marsh. 550. S. C.

namely, that if the money were not paid, an execution would instantly issue. It cannot be considered as a voluntary payment. It must, therefore be repaid. This payment of costs cannot be regarded as a waver of the nullity.

Rule absolute, without costs.—*Garratt* v. *Hooper*. E. T. 1831.

DEPOSITION OF WITNESS WHEN ILL.

The deposition of a witness alleged to be ill cannot be read before the grand jury, unless the fact of illness is verified by the affidavit of a medical man.

Dowling applied for leave to have the deposition of a witness taken before the grand jury, on an affidavit that the witness was in so bad a state of health that it was not expected he could ever be able to attend to give evidence in person.

Bayley J. said he could respite the recognisance, but that the affidavit of a medical man should be produced; that the affidavit read was not of itself sufficient, but the prosecutor should have the judgment of a man of science. — *Rex* v. *Hocket*. Herts Spr. Ass. 1830.

CRIMINAL INFORMATION.—PERJURY.

The Court will not grant a criminal information for perjury, unless the grand jury has thrown out the bill; or where, from the offence having been committed in a local jurisdiction, there is reason to believe that corrupt motives would prevent the finding of the bill.

Denman moved for a rule to show cause why a criminal information should not be filed against the defendant, for perjury alleged to have been committed in an affidavit.

Lord *Tenterden* C. J. said it was a very unusual course, although there was no doubt the application might be made; but

Parke J. thought that it could only be made where the bill had been thrown out by a grand jury, or where there was a local jurisdiction, and there was reason to believe that there would be corrupt motives in refusing to find the bill. —*Rex* v. *Scott*. T. T. June 14. 1830.

WITNESS. — INCOMPETENCY. — INTEREST. — INFANCY.

Where a plea of infancy has been set up, and the incompetency, on account of interest, of the witness called to prove the plea is not discovered till the case on both sides is closed, the objection is then too late.

This was an action upon a bill of exchange drawn by the plaintiff upon the defendant, and accepted by him. Plea, infancy; and issue thereon. At the trial before Lord *Tenterden*, the mother of the defendant was called to prove his infancy She was examined and cross-examined, and the cause proceeded; but when Lord *Tenterden* was about to sum up, the defendant's counsel took an objection to the reception of the mother's testimony, on the ground that she had been one of the bail in the action, and which fact had only just then been communicated to him. Lord *Tenterden*, however, ruled, that the objection came too late, and the plaintiff had a verdict.

Archbold now moved for a new trial, on the ground that it was not too late to have received evidence of the incompetency of the defendant's mother. He contended, that although the rule was formerly strictly observed, that an objection to the competency of a witness could only be taken on the *voir dire*, it had been relaxed, and that the practice now was to admit the objection at any time during the trial.

Lord *Tenterden* C. J. You lay that rule down too generally: there was a case tried before me on the Western Circuit, in which the objection was taken, but there did not appear to be sufficient ground for it at first; but afterwards, during the trial, it appeared that it was well founded. The Court of Common Pleas granted a new trial.

Archbold. The case of *Turner* v. *Peart*, 1 T. R. 717., shows that it is in the discretion of the Judge, for there the objection was not discovered until five days after the trial. Mr. Justice Ashurst there says, "The regular time for objecting to the competency of witnesses is at the time of the trial. The ancient doctrine on this head is so strict, that if a witness were once examined in chief, he could not afterwards be objected to on the ground of interest. Perhaps that strictness may in some degree be relaxed by the custom of suffering witnesses to be examined conditionally, which is only waving the objection for the time. But still the objection must be made at the trial."

Lord *Tenterden* C. J. In this case the incompetency could only have been proved by the witness herself. Great injustice would have been done if the defence had been shut out.

Rule refused.—*Frieland* v. *Kilsby*. T. T. June 23. 1829.

AFFIDAVIT TO HOLD TO BAIL. — AGENT.

Where a plaintiff is in this country, an affidavit by a clerk that he "verily believes" a bill of exchange is overdue and unpaid to his employer, is not sufficient to hold a defendant to bail.

White showed cause against a rule obtained by *Follett* to show cause why the defendant should not be discharged out of custody on filing common bail. The application was made upon two grounds: first, that the defendant had been previously arrested and discharged; and, secondly, that the affidavit of debt was insufficient. The action was brought upon a bill of exchange, and the affidavit of debt was made by a clerk, who swore that the defendant was indebted to the plaintiff upon and by virtue of a bill of exchange dated and drawn by, &c. "and which said bill of exchange is now overdue and unpaid, as this deponent hath been informed by the said Elizabeth Hill, and verily believes." As to the first point, he contended that the writ having been made returnable upon a *dies non* (Holy Thursday), and the plaintiff having paid the costs, the Court would consider that sufficient punishment, and not interfere with regard to the affidavit of debt. He relied

on the case of *Bland* v. *Drake*, 1 Chit. R. 165. in which case it was holden, that in an affidavit to hold to bail made by the plaintiff's agent (the plaintiff himself being abroad), the defendant on a judgment being first positively sworn to the subsequent statement, that the judgment is still in force unpaid and unsatisfied, *as this deponent verily believes*, will not vitiate.

Bayley J. The date of the bill does not appear in the affidavit?

Follett. In the case cited the party was abroad. — He was then stopped by the Court.

Lord *Tenterden.* Elizabeth Hill might have made the affidavit herself.

Rule absolute, with costs.—*Hill* v. *Ogle*. T. T. July 23. 1830.

CERTIORARI, NECESSARY AFFIDAVIT TO OBTAIN.

In order to obtain a certiorari *to remove an indictment for conspiracy from an inferior jurisdiction into the K. B. on the ground of the probability that points of law will arise, the affidavit should state what the points of law are.*

Espinasse moved for a *certiorari* to remove this case, which was an indictment for a conspiracy, from the London Sessions into this Court, upon an affidavit, which stated that several questions of law were likely to arise, and that the parties wished to have it tried by a Judge of this Court.

Lord *Tenterden* C. J. held that the affidavit was insufficient, as it did not state specially what were the questions of law likely to be raised.

Motion refused. *Rex* v. *Pepman and others*. T. T. July 7. 1830.

EJECTMENT.—SERVICE ON WIFE OF TENANT IN POSSESSION.

In ejectment for land, service on the wife of the tenant in possession at his dwelling-house is good.

Wyborn moved for judgment against the casual ejector. The ejectment was to recover land only, and the service was upon the wife of the tenant in possession, at the dwelling-house of the husband, but the house was not upon the land.

Bayley J. That is good service, as it is at the dwelling-house of the husband; it shows that the husband and wife were living together.—*Doe* v. *Roe*. T. T. July 7. 1830.

ANSWERS TO QUERIES.

SUB-LEASE. P. 271.

In answer to the query of *F. G.*, I beg to observe, that if a tenant, whose lease or agreement has expired, is permitted to continue in possession pending a treaty for a further lease, he is not a tenant from year to year, but so strictly at will that he may be turned out of possession without notice. *Vide* 12 Petersdorff, 41. It is quite clear, when the twelvemonths had expired, that a new tenancy was not created merely by the landlord's neglecting to take possession. See the case of *Cobb* v. *Stokes*, E. T. 1807, K. B. East, 358. The lessor has undoubtedly a right to enter and distrain upon the premises for the whole amount of rent due for the house.

H. B. A.

MORTGAGE POWER. P. 223.

It is difficult to conceive how, in a mortgage by demise, a power can be given to the mortgagee to convey the fee simple. Powers are either common law authorities, or powers (properly so called) deriving their effect from the Statute of Uses. Now, the power in question cannot be supported at common law, for common law authorities are admissible only in wills and acts of parliament; neither can it take them under the statute, for the instrument which contains it operates wholly under the rules of the common law. In the words of Mr. Preston (2 Abstr. 246.), "No one, except by committing a disseisin, can transfer the legal estate, unless it be vested in him, or unless he have a power or authority over the estate: and he cannot have such power, unless it be under a conveyance or devise to uses; nor such authority, unless it be given to him by will or act of parliament."

H. H.

REVOCATION AND APPOINTMENT. P. 223.

I am of opinion that the power given to *C.* is a valid statutable power; and that *C.*'s revocation and appointment would invest a purchaser with a complete title to the fee. Assuming this to be the case, a purchaser could not insist on *A.* or his heirs being made a party to the conveyance. *Clay* v. *Sharpe*, 18 Ves. 346. note. *Corder* v. *Morgan*, ib. 344.

H. H.

ARREST.—ESCAPE. P. 223.

The sheriff, and not the officer, is liable to an action for an escape, provided he have not the defendant at the return of the writ. But the plaintiff must prove a cause of action against the prisoner, and the damages will consist of the debt proved. It is presumed that the arrest had been completed by the seizure or touching of the defendant's body; for the mere going into the house amounts to nothing, unless the officer neglected to take him when he had an opportunity.

H. H.

ILLEGITIMACY. — DOWER. P. 224.

The only question is, whether the marriages of the two sisters were valid; for, if so, the one is entitled to dower of the estates of her deceased husband, and the children of the other are legitimate. Now, as far as respects the names in which they were married, undoubtedly the marriages were good; for it has been repeatedly decided, that where parties are married in the names *by which they are known in the world*, though not their baptismal or real names, the marriage is good. *Rex* v. *Billinghurst*, 3 M. & S. 250. *Rex* v. *Burton-upon-Trent*, ib. 537.

H. H.

LEGACY. P. 207.

The querist has, for the solution of this query, stated facts unimportant, and omitted to state important facts; and the respondent *D.*, page 287., mis-states facts, and states no law at all.

I apprehend the law on the subject is perfectly clear. The most important fact to be known is, whether *C.* could by possibility be the heir of *B.* If not, the devise to *B.* conferred on her, as to the freehold, the fee simple absolute, and a customary fee as to the copyhold; and as to the leaseholds, it gave here the absolute interest, the devise over being simply void. See *Pickering* v. *Towers*, 1 Eden, 142. If yea, the devise to *B.* conferred on her, as to the freehold and copyhold, an estate tail, (Cro. Jac. 427. Amb. 3d ed. 478.), and as to the leasehold it gave her the absolute interest. (Roper's Leg. vol. ii. c. 22. p. 445. ed. 1828.) There are numerous other authorities for the above positions. They will, however, be found in Fearne's elaborate work on Contingent Remainders.—In the foregoing observations I have, of course, assumed that *B.* is legitimate, and also a natural born subject.

A.

FILIATION.—BANKRUPT. P. 287.

Upon referring to the case of *The Churchwardens of the Parish of St. Martin* v. *Warren*, 2 Starkie, 188., I conceive that the obligor's bankruptcy would not absolve him from his liability to the parish under his bond, and that the same may be enforced by an action at law.

G. H. I.

CHANCEL.—SURPLICE FEES. P. 320.

I am of opinion that a lay impropriator has a right to bury his family in the chancel of the church. The vicar has undoubtedly a right to his surplice fees, which, on account of the deceased having been a non-resident of the parish, are, I believe, usually double, or at all events considerably more than they would have been had the deceased been residing in the parish.—I have known a much larger sum than two guineas demanded upon those occasions.

H. B. A.

TRANSFER OF MORTGAGE.—AD VALOREM. P. 224.

An assignment of mortgage is still but an assignment, notwithstanding the mortgagor join in it, with the introduction of new words of grant, and a new proviso for redemption and covenant to pay, which is invariably done where the consent of the mortgagor can be obtained.

The querist mentions a covenant to insure, *and to charge the premiums on the premises*, but does not state whether the insurance contemplated be a fire or life insurance. In the *former* case, the moneys to be advanced for the insurance are expressly exempted by the Stamp Act from the operation of the *ad valorem* duties on mortgages. But if the mortgage money is to be secured by a *life* insurance, the exemption does not apply, and therefore some limit should be affixed to the amount of the moneys to be advanced for that purpose, in order to avoid the duty of 25*l.* which attaches to securities for indefinite sums. See 5 Bythewood's Conveyancing, continued by Jarman, p. 243.

H. H.

MARRIAGE.—MINOR. P. 224.

It is presumed that *B.* married without the consent of her parents and guardians, or no question can arise. The time of the marriage should also have been stated. By the 26 Geo. 2. c. 33., a marriage under such circumstances would have been void: but such a marriage is now valid; the 4 Geo. 4. c. 75., which requires the consent of parents, &c. being directory only. *Rex* v. *Birmingham*, 8 B. & C. 29.

H. H.

QUERIES.

BANKRUPT'S BOOKS.

What is the duty of an assignee of a bankrupt's estate in regard to the bankrupt's books and papers *after final dividend?*—Is he bound to keep them at his own expense and inconvenience; and if for any, what period? or would be justified in selling or giving them up to the bankrupt or any other person?

Q. O.

DEVISE.—TRUST.

A testator, after devising certain estates to *A. B.* for life, gave and bequeathed all and singular his real estate unto *C. D.*, to him and his heirs for ever, if he should be living at the decease of the said *A. B.*; if he should die and leave lawful issue, his will was, that the property should be divided amongst them; but, if *C. D.* should die and leave no lawful issue, then the estates to go to *E. F.* and his heirs for ever? *A. B.* is now dead, what estate does *C. D.* take in the premises? Will a fine or recovery be requisite to pass the estate of *C. D.* to a purchaser?

GAME QUALIFICATION.

Does a freehold estate of 100*l.* per annum qualify an infant to kill game?

WILL.—VESTED INTEREST.—POWER.

A. B. by his will devised certain lands to *C. D.* for life; and, after his death, to *R. L.*, and his heirs born of the body of *E. L.*, to be shared equally amongst them as he the said *R. L.* should think proper; so, that nothing in his said will mentioned, should go to any child or children of *R. L.*'s, whilst any of the aforesaid children were living. Would *R. L.* take an estate tail? or what other estate under the above clause? And could he devise the property in equal shares amongst his children born at and after the execution of the above will? or must he be confined strictly to the above will? or had he the power of disposing of it as he thought proper? And what estate would such children take therein?

J. M.

DOWER.

A., in contemplation of marriage, conveys his property upon the following trusts; viz. to himself for life, remainder to his mother for life, remainder to his widow for life, remainder to chil-

dren in common, &c. Does not the mother of *A.* take subject to the thirds of *A.*'s widow? or can *A.*'s widow be in any way deprived of her dower? N. B.

NEW RULES.—FILING DECLARATION.

I have read Mr. Chapman's valuable publication upon the Practice of the King's Bench, as altered by the Act of 1 W. 4. c. 70. and the New Rules lately promulgated by the Judges; and I wish to be informed, whether a declaration *filed conditionally* on the return of common or bailable process would be good. The rule of Court (tenth) merely mentions that no declaration shall be *delivered* until six days after service of process, or until six days after arrest. Now, suppose I was to serve a writ on the 1st of November, and *file* my declaration conditionally on the 2d, I conceive it would be perfectly regular, and the Master could not say that I was not entitled to the costs of such declaration. The words "or filed," surely must have been omitted by mistake; or perhaps the Judges considered they had already done quite enough towards diminishing the attorney's profits.

A Subscriber.

PRACTICE.— DISCHARGING MORTGAGE.

It is the practice with many solicitors (when a mortgagor wishes to pay off a mortgage after the time mentioned in proviso, and without having given any previous notice to the mortgagee of his intention to do so,) to require of the mortgagor a quarter's interest by way of fine, in lieu of six months' notice: I therefore beg to be informed by some of your readers, whether there has ever been any decision upon the point; and whether the practice comes within the letter of the usury laws?

H. B. A.

MISCELLANEA.

ANCIENT LEGAL EXERCISES.—READINGS.

Tuesday next before the reading begins, the reader takes his place at the upper end of the bench table, in the treasurer's place; and supper ended, the antientest utter barrister in commons brings in a case at the bench table, which the reader and benchers are to argue, if they will. And then, after rising from the table, the reader first, and next all the benchers and gentlemen follow, and come to the place between the buttry door and backside of the skreen in the Hall, where the reader, by some plausible words of house-speech, declares publickly the statute whereon he purposeth to read the next day. Then the antientest bencher, by another plausible house-speech, commends Mr. Reader's discretion in the choice of his statute, and declares the desires of the whole House, and what great desire they have to hear the reader's learned conceipts upon that statute in his ensuing reading, and so take leave and depart.

The next morning, about 8 or 9 of the clock, the reader comes into the Hall, followed by the Judges, if any of that house be present, and benchers that attend the case that day; and, as soon as the reader is set at the table, and all ceremonies of curtesy made, the reader takes the oaths of supremacy and allegiance, and then makes another house-speech, wherein he utters some divisions and expositions of the statute whereon he is to read.

During the reading-time, the reader is to read every reading-day his two first cases twice, if the barrister who is to argue the case do desire it; and the first day, the antientest utter barrister in commons is to take the reader's case, and is to argue it, and the readers of Innes of Chancery, and the vacationer utter barristers, one after another, are to take the reader's case in the morning every reading-day; and the antientest bencher or the antientest of the Judges then present, who are to argue the reader's case (if they will), may put the utter barrister appointed to argue that morning to any other of the readers' cases; after whom the Judges and benchers argue according to their antiquity; the puisne bencher beginning first; and so every one after another, till the antientest Judge or bencher have argued the case; all which is to be done *ex tempore* pro and con. And lastly, the reader to answer the objections made against his conclusion, to shew his opinion of his case, as he takes the law to be; and so concludes that morning's reading.

Immediately after the first morning's reading ended, the reader delivers his paper of cases for that morning to the puisne vacationer utter barrister, who is to argue one of those cases which he likes best, immediately after dinner, at the bench table end; and the puisne barrister, and all the other barristers attending the reading, resort together, to break the case and open the points to the said puisne barrister; and then he, after dinner, and after him every bencher present, argues the case pro and con. And, lastly, the reader concludes the argument with his opinion as he takes the law. And so the exercise is continued every reading-day, which is closed up by the antientest of the bench; and then the reader, with congratulatory house-speeches, each to other for their company, pains, and attendance, costs and charges.

Before any moote in the Hall, after supper, the benchers go all behind the skreen as afore, and there break the case, which is to be argued then forthwith in the Hall: and they have power to over-rule the case, as not argumentable; and that over-ruling is termed a fallure, and the whole inner Barre is to be amerced, unless they presently plead and argue another case of the same learning, which, if the benchers that sit approve of, the amercement is saved.

Although the reader at the first week's end, or fortnight's end, do end his reading, yet there is exercise in the house or abroad, by readers or vacationers, untill the end of the whole reading month, as if the reading had so long continued. But if no reading at all be in the House, yet are the readers of Innes of Chancery, and the gentlemen of the inner barr, to hold the grand mootes, so long time as any other reader of any other the three Innes of Court do continue

their reading, except in time of mortality.—*Dugdale's Orig. Jurid.*

JUDGES HUNTING THEIR OWN VENISON ON CIRCUIT.

The following is an extract from a steward's old accompt book, found in the noble old mansion of Orchard Portman, near Taunton, in Somersetshire.

10th August, 1680.

Delivered Sr William in the higher orial going a hunting with the Judges, 2*l*.

From hence, therefore, it appears, that in those days buck hunting was so much delighted in, that even the Judges could not refrain from partaking in it on their circuits; and it seems that they chose to hunt their own venison which they annually received from Orchard Park at the time of the assizes.

FANS FORMERLY CARRIED BY THE JUDGES.

The gentlewomen had prodigious fans, as is to be seen in old pictures, like that instrument which is used to drive feathers; and it had a hendle at least half a yard long: with these the daughters were oftentimes corrected. Sir Edward Coke, Lord Chief Justice, rode the circuit with such a fan; Sir William Dugdale told me he was an eye witness of it. The Earl of Manchester also used such a fan.—*Aubrey's Customs and Manners of* 1678.

IMPRISONMENT FOR DEBT.

A bill to abolish imprisonment for debt, and to punish fraudulent debtors, has passed the Senate of New York; but its operation is suspended, in reference to all debts now contracted, until the 1st of March, 1832. Persons who may receive the goods of fraudulent debtors, with the intent to defraud any creditor, are made liable to the punishment provided in the bill for fraudulent debtors.

ANTIQUITY OF FINES.

"It often happens," says Glanville, "that disputes moved in the King's Court are terminated by final concord: but it is then by consent either of the King, or his justiciar, whatever be the cause of dispute, whether for land, or any other thing, which agreement is reduced into public writing by the mutual consent of both parties; and this writing is to be recited before the King's justices sitting in the Court of Common Pleas, and before them the said writing, in all points alike, is there to be delivered."

Fines are said, by Plowden, to have been levied before the Conquest: and another author makes mention of one taken at Norwich in the time of Henry the First, instancing for testimony of the same an exemplification of it under that King's seal.

Many fines, says Herbert, were levied in the reign of Henry the Second, and more in the time of Richard his son, as well as afterwards; most of which are now remaining in the Exchequer. Anciently fines were levied before various persons, and frequently before the King himself; others before the Chief Justice, with other of the King's justices, *et aliis fidelibus domini regis*. Nor were they limited merely to the Courts at Westminster in those times, as a copy is still remaining of one levied in the County Court at Nottingham, in the first year of the reign of King John, in the presence of the sheriff and the chief gentlemen of that shire.—*Ex Cartulario Abb. de Derley in Bibl. Cotton. f.* 74 *b.* Another appears to have been levied at Pontefract, in the court of Roger de Lacie, then constable of Chester.—*Ex Regist. Abb. de Kirkstall in Officio Ducatus Lanc. f.* 29 *b.* Several instances likewise occur of fines levied where the King himself was a party.—*Finis levatus apud Westm. in octabis Purif. beatæ Mariæ, an. 53 Hen.* 3., &c.

TALE OF A TUB.

An anecdote in More's chancellorship is connected with an English phrase, of which the origin is not quite satisfactorily explained. An attorney, in his court, named Tubb, gave an account in Court of a cause in which he was concerned *, which the Chancellor (who, with all his gentleness, loved a joke,) thought so rambling and incoherent, that he said, at the end of Tubb's speech, "this is a Tale of a Tub;" plainly shewing that the phrase was then familiarly known.

Sir James Mackintosh, by whom the life of Sir Thomas More has been written, after stating the above, proceeds to say, that "the learned Mr. Douce informed a friend of his, that in Sebastian Munster's Cosmography, there is a cut of a ship, to which a whale was coming too close for her safety, and of the sailors throwing a tub to the whale, evidently to play with. The practice of throwing a tub or barrel to a large fish, to divert the huge animal from gambols dangerous to a vessel, is also mentioned in an old prose translation of The Ship of Fools.

"These passages satisfactorily explain the common phrase of throwing a tub to a whale; but they do not account for leaving out the whale, and introducing the new word, tale. The transition from the first phrase to the second is a considerable stride. It is not, at least, *directly* explained by Mr. Douce's citations; and no explanation of it has hitherto occurred which can be supported by proof. It may be thought probable, that in process of time, some nautical wag compared a rambling story which he suspected of being lengthened and confused, in order to turn his thoughts from a direction not convenient to the story teller, with the tub which he and his shipmates were wont to throw out to divert the whale from striking the bark, and perhaps said, 'this tale is like our tub to the whale.' The comparison might have become popular; and it might gradually have been shortened into 'A Tale of a Tub.'" *Lardner's Cyclopedia*, British Statesmen, vol. i. p. 107.

* It would appear from this account, that the attorneys were accustomed in those days to plead personally before the Court.

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"——— Quod magis ad nos
Pertinet, et nescire malum est, agitamus."
HORAT.

THE LORD CHANCELLOR AND THE BANKRUPTCY BILL.

THE Lord Chancellor has abundance of friends and admirers, and we rank ourselves among the number. His great talents and his political consistency command both respect and wonder; his versatility dazzles those who look on him; moreover, he is the fountain of legal honours: he has therefore no scarcity of friends, both real and pretended, and from the latter class of persons, flattery, and a ready assent to all his speculations, will not be lacking.

In this state of things, it is the more necessary, therefore, that his political conduct, and more especially his measures for legal reform, should be most narrowly scrutinised. He carries a considerable portion of the country with him, whatever he may do: be his plans good or bad, so high does he stand in the estimation of his followers, and his political and official importance is so commanding, that they will be received with acclamation. With many, Henry Brougham and the Lord Chancellor conjoined can do no wrong. If the recollection of the commoner will not support him, the first temporal peer of the land is ready to back his pretensions: if the minister and placeman is suspected one jot, he has but to call to his assistance his *opposition* reputation, and he is safe. To the young and enthusiastic, he appears as the vindicator of the oppressed and the destroyer of tyranny; to the man of the world and the ambitious, as the great man of the day — the minister in power; and to the place-hunter, as the most powerful disposer of the good things of office. With all these claims to attention, respect, and deference, is it surprising that his measures are not easily suspected? There is, in fact, a desire on the part of most men that they should turn out well; that they should be able to bear examination; that it be not in the power of man to ascribe them to any unworthy motive. The reformer is willing to believe that nothing but good can come from the hands of his former leader; the practical man is anxious to forget the theorist, and remember only that the project comes from the Lord Chancellor.

We have found it impossible always to withstand these mingled impulses; we cannot but feel a sympathy for this distinguished man; we cannot but glory in his character, and rejoice in his elevation; it is with pain that we ever find it our duty to differ from him; but this very inclination in his favour has hitherto induced us to watch his measures most rigorously, and this course we shall still continue to pursue. We are most anxious that the present Lord Chancellor should continue in office, but we see how necessary it is that his measures should be scrutinised.

There can be few persons who have observed his official career, who have not felt some anxiety. Let them think for a moment on all that he has done, or proposed to do, in his own peculiar department. Should he carry into effect all the plans which he has divulged and solemnly brought forward in about the space of eight months, the judicial system of this country will be materially altered. A local Court, with supreme power, will spring up in every county; the present administration of bankruptcy will be entirely swept away, and a new and untried system substituted in its place; the Vice-Chancellor's Court will be abolished, and the Master of the Rolls will sit with the Lord Chancellor; commissions of lunacy will be heard before common law Judges, and evidence in Courts of equity will be taken *vivâ voce*; these are only a few of the important changes proposed in this short space of time.

All these plans are calculated to be attended with extensive results; they may be proper, but they undoubtedly demand the most cautious deliberation before they are carried into execution. Now, is it possible that this can have been given to any one of them? Can the Lord Chancellor, oppressed, as he has been, with a thousand other duties, legal, political, oratorical, and literary, can he possibly have been able to afford to any of these important changes its fair share of investigation? No sooner is a new plan proposed to him than he adopts it, and proposes it in the House of Lords. A thought strikes him at breakfast, and he comes down to the Court of Chancery and states his intention of acting upon it; an incident of the day furnishes him with a new act of parliament at night. So fearful is he of becoming wedded to old institutions, that he is willing to change them the moment he becomes acquainted with them. In his first speech on law reform in the Lords, he stated his horror at becoming rooted to the soil of the Court; he likened himself to the Daphne of Ovid in the act of transformation; and this fear has acted in so lively a manner upon him, that he has become the Apollo of the story, and has ever since pursued an eager and unwearied chase after novelty.

These reflections have been forcibly recalled to our minds by the late debate on the bankruptcy bill. Our sentiments upon it, and our opinions as to the changes which are necessary in the administration of bankruptcy, are already before our readers.* We do not entirely agree with Lord Lyndhurst in his commendation of the present commissioners. We think their numbers should be diminished, and that they should not be permitted to practise at the bar, but should devote themselves exclusively to their duties as commissioners. In other respects we agree with the learned Chief Baron, who pointed out, with all his accustomed ability and clearness, the principal defects of the bill.

We shall now enquire whether the defence of its provisions made by the Lord Chancellor has removed the difficulties which surrounded the bill before the debate. The noble Lord first alluded to the petitions which he had presented against the present system by the merchants and traders of London, one of which he stated to have been signed by 5000 persons. This is the strongest point in his speech, but merely authorises an enquiry into the matters complained of, not an immediate change. He then alluded to his consultation of several of the present commissioners as to his plan. His Lordship does not state that they approved of it; and we have no hesitation in saying that he would not be warranted in such a statement. It is an undoubted fact, that the opinions of nearly every lawyer entitled to give one on the subject are against the bill. More than one eminent person who was offered the chief judgeship under the bill, declined it, on the ground of the impossibility of the success of the project. Many others have, on this account, shrunk from accepting office under it; and the unanimous sentiments expressed against it by every law Lord are shared by almost the whole of the leading members of the profession. We boldly declare this to be the fact; and if we are in the wrong, we shall be glad to be informed of one important opinion, in public or private, expressed in its favour. The Lord Chancellor next proceeded to the attacks made on the present commissioners; he declared he did not object to the men, but to the system. The question was, he said, whether there was greater probability that ten or eleven good judges could be selected, than seventy could; he admitted, however, that the majority of the commissioners were better informed than might be expected. If this be the case, why, we would ask, are the whole of these gentlemen, after their long experience in these matters, to be put out of office? Is it not the wiser plan to take the best of them, than to transfer the business to untried hands? He then alluded to the responsibility of the present commissioners for the commitment of a bankrupt, and considered it to be an evil. This defect could surely easily be remedied. The Lord Chancellor then alluded to the charge of the increase of patronage which the bill will give him. Here his reasoning was singularly fallacious. He stated, that as he was abolishing seventy offices, and substituting only ten or eleven, this charge could not properly be made; but he forgot that, of the seventy, if he retires from office, he may never appoint one; and that, if the bill passes, he will immediately have the appointment to the eleven important offices which it creates, and of nearly fifty other subordinate offices which will be rendered necessary by it, most of which are more considerable than a commissionership of bankrupts now is. We were surprised, therefore, to hear his Lordship state that he was not prepared for this charge.

These are the main points of his speech,

* See *antè*, p. 177.

which appears to us unsatisfactory. There are sufficient grounds shown to justify enquiry. It would, undoubtedly, be proper to bring in a bill to remedy the admitted evils of the system; but we are not entirely satisfied with the present one: its expense must be great; its direct disadvantages are considerable, and its benefits doubtful. We must repeat, that the safe rule, in legal legislation, is, to alter as little, not as much, as possible; and we shall speedily enquire how far this project interferes with this axiom.

NEW BILLS IN PARLIAMENT.

CONTEMPTS IN ECCLESIASTICAL COURTS.

Analysis of a Bill intituled An Act for enforcing the Process upon Contempts in the Courts Ecclesiastical of England and Ireland.

The bill recites that great inconvenience has been found to arise by reason of the process of the several ecclesiastical Courts in England and Ireland being inoperative and unavailable out of the limits of the respective jurisdictions of such Courts, and against persons having privilege of peerage, Lords of parliament, and members of the House of Commons; and in many instances a failure of justice hath thereby ensued.

It is therefore proposed to be enacted:—

1. That where persons residing beyond the jurisdiction of any ecclesiastical Courts are cited to appear or to comply with some order, and refuse obedience, or commit a contempt towards such Court, the Judge thereof may pronounce them contumacious, and certify the same to the Lord Chancellor, or Keeper of the Great Seal in England or Ireland, as the case may be, within ten days, and thereupon a writ de contumace capiendo shall issue, unless the person be a peer, Lord of parliament, or member of the House of Commons.

All regulations and provisions applying to the writ de excommunicato and proceedings thereupon shall be applied to the writ de contumace.

Upon the appearance or submission of the party the Judge may order him to be absolved or discharged, on payment of the costs.

2. That where persons having privilege of peerage or parliament, and being possessed of estates, &c. in *England*, neglect to pay money ordered by the said Courts, the Judges may pronounce such persons contumacious, and certify the same to the Lord Chancellor in England, who shall cause process of sequestration to issue against the estate of the party in England. The money levied, to be paid into the hands of the accountant-general, without being subject to poundage.

3. The same provision as to persons having the like privilege of parliament, and being possessed of estates, &c. in *Ireland*.

4. The act not to extend to orders made six years before its passing.

5. Limitation of actions to three months for any thing done under this act.

The general issue may be pleaded, and special matter given in evidence.

In case of determination against the plaintiff, treble costs to be given to the defendant.

PRACTICAL POINTS OF GENERAL INTEREST.

No. X.

WHAT WILL CONSTITUTE LARCENY IN A CARRIER.

The indictment charged two of the prisoners, named Fletcher and Mellor, with stealing various articles of wearing apparel, books, &c. the property of Gilbert Hardem; and a third prisoner, whose name was Beardmore, was charged with receiving the articles, knowing them to have been stolen. The prosecutor stated that the goods were in packages, and that he had directed the two prisoners, Fletcher and Mellor, to carry them to the house of the father of the prisoner Fletcher, who was to keep them safely. The prosecutor also stated that the goods were to be conveyed in his cart; but that the horse belonged to Fletcher and Mellor, who were to be paid for what they did. It was proved that the goods were not taken to the house of Fletcher's father; but were found in the house of Beardmore, having been taken out of the packages in which they had been packed by the prosecutor.

Meeson, for the prisoners, objected that this was not a larceny.

Greaves, for the prosecution. These goods were delivered to the prisoners, Fletcher and Mellor, for a special purpose.

Mr. Justice *Patteson*. There is no evidence that the packages were opened while the goods were in the possession of the two prisoners, who are charged as principals; and a carrier cannot be guilty of larceny unless he breaks bulk.

Greaves. These persons were not common carriers, they were merely employed in this particular instance.

Mr. Justice *Patteson*. They carried for hire. It is proved that they were to be paid for taking these goods. There is the case of a captain of a ship, which is a very strong authority on this point.—*Rex* v. *Madox*, R. & R. 92. *Rex* v. *Fletcher*, 4 C. & P. 545.

COMMON LAW PRACTICE.

PETITION OF THE ATTORNEYS OF ONE OF THE SUPERIOR COURTS FOR SIMPLIFYING WRITS, AND AUTHORISING THEIR RETURN IN VACATION.*

To the Honourable the Commons of the United Kingdom of Great Britain and Ireland, in Parliament assembled,

The humble Petition of the undersigned Attorneys of one of the Superior Courts at Westminster,

SHEWETH,

THAT your petitioners, deeply impressed with the conviction of the necessity of an enquiry into the system of practice and proceeding in the Superior Courts of Common Law, which, with little alteration, have descended from very remote times (to which only they were adapted), and feeling assured that the same required amendment, perceived with satisfaction that your honourable House had taken the subject into consideration; and that in consequence thereof it had been determined to intrust to persons qualified by their knowledge and experience therein, to collect information, opinions and suggestions, and to report what alterations should, in their judgment, be made, and the mode in which the same should be effected.

That your petitioners viewed with peculiar approbation the excellent observations and suggestions, contained in the First Report of the Common Law Commissioners (dated two years and a half ago) on the subject of the *complicated, expensive, dilatory, and inefficient forms on the the commencement of actions* in the Courts of Law.

That it appears by such Report that the varieties of primary process of the common and ordinary description alone, amount, in the Court of King's Bench, to *eight;* in the Common Pleas, to *six;* and in the Exchequer, to *six* also; some of which are attended with great expense and delay; and that in the book usually consulted for authority and instruction in matters of practice, no less than 154 closely printed pages, of large octavo, are occupied in treating of the forms and intricacies attending initiative process alone.

That the Commissioners also pointed out the vexations, delays, and inconveniences to suitors occasioned by *writs being returnable only in the four Terms*, by reason of which and of the consequent regulations as to pleading, plaintiffs can only at those comparatively short periods, consisting of about *three weeks each*, compel an effective prosecution of their actions, although such proceedings may be as effectively taken in vacation as in term; and similar proceedings are accordingly taken in almost every inferior Court in the kingdom at all times of the year, to the manifest advantage of the community.

That your petitioners have never heard any other feeling expressed, than one of approbation, of the suggestions of the Commissioners for correcting the delay, embarrassment, difficulty, and expense attendant on the existing system in these respects; and they have anxiously expected to see the evils remedied, as they believe they might easily and satisfactorily be, by the adoption of measures pointed out in the Report.

That your petitioners understood a considerable time ago that a bill had been prepared for this purpose; and they cannot hesitate in their conviction, that if submitted to the legislature, it would pass into a law with universal consent.

That your petitioners (anxious to relieve themselves from imputations of delay in proceedings committed to their charge, whilst *the power to expedite is denied to them by the existing state of the law*), venture to urge the subject on the attention of your honourable House; more particularly at the present time, because they conceive that unless the remedy is applied before the ensuing Term, one of the evils above alluded to will be considerably increased by a late rule of the Superior Courts at Westminster, by which it is, in order to repress the hasty and vexatious accumulation of legal expenses upon defendants, provided that plaintiffs shall not deliver any declaration until six days have elapsed after service of process, whereby the period allowed for effective proceedings in suits at law depending in those Courts will be reduced to about *sixty days in the whole year;* and by reason whereof, unless process can be issued and executed before the 8th of June in each year, a creditor cannot take any proceeding against his debtor until the month of November following; thus holding out an inducement to the debtor to keep the creditor out of the receipt of his debt *five months*, without incurring any expense beyond the issuing of the writ.

That your petitioners are confident that they speak the wishes and feelings of the great body of their brethren, in expressing their perfect approbation of and concurrence in any such wise and judicious regulations, as the rule above alluded to provides for protecting parties against vexatious and unnecessary expense, and for repressing any practice inconsistent with the interests of the community, and the respectability and credit of their branch of the profession.

That so feeling, they trust their motives will be duly appreciated, when they respectfully submit to your honourable House, that by the operation of that rule, the period of term during which alone a plaintiff can compel appearance, and proceed in his action, is reduced in country cases by at least one third.

That your petitioners therefore, while they fully admit the justice and propriety of regulations for protecting *debtors* from unnecessary expense, submit that the legislature (which is alone competent to supply the defect) would add to such new regulations one equally just and necessary for the interests of *creditors*, by removing some of the *restraints of the terms*, and simplifying the early stages of procedure: and that without such enactment the interests of the latter (whom experience proves to be in the great majority of cases in the right), will be greatly prejudiced by the partial reform effected. And your petitioners submit that the relief and facility afforded by a late act of parliament, in enabling plaintiffs to obtain judgment and execution immediately

* We insert this document at the request of one of the petitioners, from whom we understand very numerously signed.—ED.

after verdict, becomes of comparatively little importance, if the scanty period now allowed for effective compulsion of appearance, plea, and trial, is still further abridged.

That independent of the particular evil above pointed out, as calling out for immediate attention, your petitioners beg leave to submit to your honourable House, that it is of the first importance to relieve both suitor and practitioner from the intricacies, expense, and delays attendant on the present barbarous and inconsistent system of initiatory process; and they confidently assert that, by the alterations suggested for adoption, a very important measure of economy might ultimately be effected, inasmuch as a variety of distinct offices and establishments are now necessarily maintained, which, under a proper revision of the system would become useless, and *would cease with the lives of the present occupants to be a charge on the country.*

Your petitioners therefore humbly pray that your honourable House will not separate without passing a bill for giving effect to the recommendations of the above mentioned Commissioners in these respects.

And your petitioners will ever pray, &c.

REVIEW.

A Collection of Statutes, comprising all the Public Acts, Civil and Criminal, Irish, and Scotch, and Acts relating to the Colonies passed in 1 William IV., *with Notes, shewing the Alteration made in the Law by each Statute.* By Alfred S. Dowling, Esq. of Gray's Inn, Barrister at Law. London: S. Sweet; Stevens and Sons.

We are here presented with a second volume of this collection of statutes, which is published on a plan adapted to meet the wishes and convenience of no inconsiderable part of the profession, to whom the Statutes at Large are not easily accessible. The work possesses the advantage of being published at short intervals, and must therefore be particularly useful to the general practitioner. Of course this mode of publication precludes that *classification* of the subjects of the acts by which the work of Sir W. D. Evans was so elaborately distinguished.

The notes, showing, as the title page expresses, "the alteration made in the law by each statute," are well calculated to assist the members of the profession. Amidst the numerous and incessant changes which are in progress in all departments of the law, it would be impossible for the old practitioners to steer their course aright, without the aid of these new lights shining on the intricate pathways of modern reform.

The acts comprised in the period to which the present volume relates, are twenty-seven in number, of which eighteen are printed at length, and of the rest the titles are given. We think it would be an improvement, if the statutes relating to the administration of justice, in its largest sense, were separated from the rest. Those which concern the Colonies might form another division; and, for our parts, we should prefer the acts more immediately of a political nature to be also subdivided; for instance, the fiscal separated from the others. A chronological table might still be added as a useful appendage to the publication.

We shall soon be enabled to lay before our readers a short series of articles on the present practice of the Courts, and we therefore pass by the details contained in the Editor's notes. We extract, however, the following, as one of general interest: —

"The principal object of this act [cap. 2.] is to secure the succession to the Princess Victoria, who is now in her thirteenth year, and will not be qualified for the sovereignty of the country until she has attained the age of eighteen. But as his present Majesty may die before that time, it was necessary that provision should be made for the government of the country in case of such an event. For this purpose this act declares, that the Duchess of Kent shall be guardian of the Princess during her minority, and also sole Regent of the kingdom. It will be seen, that no provision is made for appointing a council either to assist or control the Regent, as in former instances, in 1751 and 1811. She is left to act under the advice of the ministers whom she may appoint. The act further provides, that if, at the death of the King, there shall not be living any child of the King, but a child shall afterwards be born, her Majesty shall be the guardian during its minority; but no provision is inserted providing for the event of the King having a child in his life-time, a clause of this nature being purposely omitted, as it was not intended to provide for every contingency that could happen. For the same reason, no clause is inserted providing for the event of the death of the present Queen, and the subsequent marriage of the King, and his having issue by his second consort.

"In the discussion of the bill, the supposition of the King dying leaving the Queen *enciente* gave rise to considerable argument. Lord Lyndhurst, then Lord Chancellor, after admitting it to be a difficult point, and declaring that he could find no direct authority upon it, stated that the descent of the crown followed the law of real property, with two exceptions; the first being, that half-blood is no bar to the succession, and the second, that in case of two or more daughters, the eldest succeeds; and that a child, before its birth, could not be seised of real property; but that, until the birth, it vested in the presumptive heir; and further, gave it as his opinion, that the crown stood in the same situation. The present Lord Chancellor was of the same opinion, and cited, as a somewhat

parallel case, the instance of Geoffrey, the son of Hen. II., who was Duke of Brittany, which he held as a fief of the Duchy of Normandy. Henry was Duke of Normandy as well as King of England. Geoffrey died, leaving a widow (Constance) *enciente*, and a daughter, Eleanor. Eleanor was immediately recognised as Duchess of Brittany, and no one held that allegiance was due to the child *in ventre sa mere*. Constance afterwards gave birth to Arthur, who became Duke the moment he was born. Sir Charles Wetherell was also of the same opinion, but was anxious to introduce a declaratory clause to that effect. Mr. Campbell also stated his opinion to be the same. So that, as far as authority can settle a point, the matter seems no longer attended with difficulty."

We have looked through all the notes, which explain the general scope of the acts, the changes which they have effected in the former law and practice, and the several doubts which have already arisen in sufficient abundance on the construction of many of the clauses; and we think that this, as well as the other parts of the work, has been carefully executed, and the whole is well entitled to the encouragement of the profession.

MEDICAL JURISPRUDENCE.

No. VI.

HOMICIDE. — POISONING.

We select a part of the last Lecture of Mr. Amos at the London University, in which he noticed the trial of Freeman on the 2d of April, 1829, for the murder of Judith Buswell, at Leicester, by administering to her *prussic acid*. This case had been remarked upon by Dr. Christison in his work on Poisons; but, as the Professor observed, the evidence against the prisoner was by no means so strong as stated in Dr. Christison's account. Mr. Amos, being in possession of a complete report of the whole trial, taken in shorthand by a professional reporter, read the evidence of the medical men who were examined. It is as follows: —

"Mr. *Thomas Paget*.—Is a surgeon in Leicester; was called to Mr. Bigg's house on the 12th of February, at half-past seven in the morning. Went into the deceased's room, and found her lying on her back, with her head resting on the back of the bed-board. She was dead. Judging from the rigidity of the muscles, she seemed to have been dead four or five hours; did not stay many minutes; did not remove the bed-clothes; did not turn them down; told them to let the things remain as they were, and inform the Coroner immediately; returned about four o'clock in the afternoon; the room was in the same state as in the morning; the deceased was lying in the same form, with the exception of her left hand being nearer to her stomach; proceeded, together with Mr. Wilkinson, another surgeon, to examine the body; found the body in a state of freshness; attributed her death to her stomach containing a great quantity of prussic acid; the contents of her stomach were strongly impregnated with prussic acid; she was between six and seven months gone with child; the child was recently dead.

"Cross-examined.—From experiments which witness has seen tried on animals, thinks it is *possible* she might have had the power of corking the bottle.

"Re-examined. — The operation of prussic acid is always calculated by seconds; cannot tell how long half an ounce would be in its operation upon the human species; it would operate sooner upon brutes; has seen a small dog rendered insensible in ten seconds by the same quantity the deceased is supposed to have taken; has also given a cat half the quantity, which he conceives fully adequate to her frame; she was thirty seconds before she fell insensible; another cat, to which a quarter of the quantity was given, fell insensible within twenty seconds; mentioned this as shewing the irregularity of prussic acid in its operation; the two doses were out of the same bottle, shewing its effects on different constitutions; the last-mentioned cat was a stronger and larger cat than the one which took thirty seconds to be rendered insensible.

"By the Judge. — The animal appeared conscious of what it was about till the moment it was seized with convulsions; cats and dogs walk about the room for several seconds after having taken it, till they are seised with convulsions; thinks deceased might have had knowledge to cork the bottle after she had taken the poison; thinks it is *possible;* cannot form an idea as to the probability; smelling the bottle will produce sickness and insensibility in some people; it will produce a sense of sickness, and in others insensibility; its force would not be weakened by being kept in a dark place a fortnight — thinks not; druggists are obliged to leave it and other poisons accessible to their apprentices for making up prescriptions; some of the experiments spoken of were made with the prussic acid that remained in the bottle.

"*Edward E. Wilkinson*. — Is surgeon to the Leicester Infirmary; was with the last witness when the body of the deceased was opened; concurs with him in his opinion as to the cause of her death; is not able to form any opinion of the quantity of prussic acid taken into the stomach; saw the chamber-pot; a small piece of leather in it; it appeared as if it had been tied round the top of the bottle; there was likewise a small string, which seemed to have been used for the purpose of tying the leather round the neck of the bottle; was present when experiments were performed on the Wednesday.

"Cross-examined. — The piece of leather was found in the pot; did not perceive there was any sickness in the pot; it was past four o'clock in the afternoon when he saw it; should think smelling prussic acid would produce faintness; has seen experiments tried this morning; if deceased took four drachms, should think she

could not have power to cork the bottle; saw a dog take four drachms — it died in eight seconds; from what remained in the bottle produced, should think four drachms were taken by the deceased; never heard of prussic acid being taken to procure abortion — it might be possible.

"Dr. *Freer* examined. — Was present at the time Mr. Macauley made experiments the day before yesterday, with the acid found in the bottle; has been in practice as a physician twenty years; prussic acid is the most violent poison that is known; thinks its immediate effects would be in proportion to the strength of the dose administered; by being exposed to the light it might lose some of its effect; saw experiments made with fresh acid and the acid found in the bottle; it varied very little in its effect from the fresh; sixty drops is a drachm; thinks that after three or four drachms had been received into the stomach, a person would not be able to do the most trifling act — certainly not; thinks it *impossible* for a person after having taken such a quantity to put a cork into a bottle.

"Cross-examined. — His judgment is chiefly from analogy; saw some experiments tried upon dogs the day before yesterday; never saw any experiments tried before; there were seven experiments; lays most stress upon the sixth experiment; four drachms and a half were given to a dog, and its effect was almost instantaneous; in his opinion three seconds had not elapsed before the dog was perfectly insensible; it was a sort of terrier, a small one; should imagine its operation upon the human species to be equally as speedy as upon brutes; its operation might vary according to the constitution; so large a dose is sufficient to destroy any constitution; never attended any person supposed to have taken it; have seen it administered in a small dose as a medicine. A dog which had taken twenty drops in five or six minutes recovered; the last experiment which was performed was giving this identical dog forty drops more; in twenty seconds he fell, howling; in thirty-five seconds he became insensible, but still breathing; in one minute he was gasping; in a minute and a half worse; in two minutes he appeared at his last gasp; in three minutes and fifty seconds he again gasped; by five minutes he was dead. — Experiment, No. 6. Four drachms and a half were given; in four or five seconds the dog was insensible and dead. No. 3. was a large dog, and double the size of the other. — Four drachms were given to him; half was lost in forcing the animal to swallow; he was a large setter dog; in thirty seconds he staggered; in forty seconds he fell; in one minute and a half dead: the immediate effect of the poison would depend on the dose taken; if food was in the stomach it would certainly make a difference; if it was a small dose it would retard the progress of the poison; if it was a large dose it would make little or no opposition.

Mr. *John Needham* examined. — Is a practising surgeon in this town; was present at the experiments to which Dr. Freer has spoken, and took the minutes; concurs mainly with him in what he has said; each animal was in a greater or less degree affected in a few seconds; one fell in half a minute; the acid taken by the deceased produced insensibility equally at the same time as the fresh, but it did not occasion death so immediately; deaths happened at forty seconds with the fresh, and at sixty-five with the other; the animals appeared in great distress, and endeavoured to eject; thinks the acid was deteriorated by the light; the comparative effect was precisely the same; insensibility was produced nearly at the same time in both the dogs; should think it was *most improbable, and next to an impossibility*, that the deceased could have had the power of corking the bottle after taking the prussic acid, and put her hands under the clothes; comes to that conclusion from the experiments he has made.

"Cross-examined. — One dog had forty drops, and one twenty, before they fell; dogs require the same doses in other medicines as human beings do; cannot say as to the effect of the poison; saw one experiment made upon a horse; six drachms were administered; it began to be affected in a minute; fell in two minutes; was perfectly insensible and dead; its heart was beating; the heart beat many minutes after it ceased to breathe; it was full a minute before it was affected at all; thinks a horse would take strong poisons without being affected; might take half an ounce of arsenic.

"Mr. *Thomas Macauley*. — Is a surgeon in this town; was present with Dr. Freer and others when the experiments were tried; concurs in the opinion they have given as to those experiments; received the bottle containing prussic acid, found in the bed, from Mr. Owston, previous to commencing experiments; measured the quantity of acid; there were more than three drachms, but less than four; about three and a half drachms; eight drachms is an ounce; some of the experiments were made with the identical acid that remained in the bottle; there was a difference in the acid taken from the bottle and the fresh acid; it was very trifling; has made previous experiments without a view to this transaction; *without denying the possibility of it*, thinks it *extremely improbable* the deceased could have corked the bottle; and from what he has read of the opinions formed by eminent medical writers, thinks it *impossible* it could be done, the operation having been done in the dark; has tried experiments on dogs and cats; its operation depends upon the dose; has given five, ten, and twenty drops; some have fallen directly, and some have walked after it for a short time; don't know what quantity deceased took; has seen dogs walk moderately well after a small dose; never saw one walk after a large one.

"Mr. *J. P. Stattard* examined. — Is a surgeon in this town; been in practice twelve years; has studied surgery all his life; was present at the experiments spoken of, and agrees in the result; reasoning from analogy, it is *not possible* for a person taking four drachms to cork a bottle; *it is impossible*.

"Cross-examined. — Has seen the effect of prussic acid upon a human being, when given as

a medicine; saw its effect upon his wife's sister; seven drops were given her, diluted; tried its effect upon a horse; after giving it three ounces it fell in two minutes and twenty seconds; another horse had six drachms given to it; it was dead sooner than the one that had three ounces. *By the Judge.*—Accounts for the quickness of the operation where the six drachms were given by having applied some previously to the eye and nostrils of the horse. *By Mr. Denman.*—His wife's sister had a violent spasmodic affection; several persons were obliged to hold her; has seen seven drops put her in a state of semi-death, having previously been in great pain; she is now living."

According to Dr. Christison's notice, the arms of the deceased were crossed over her body, the bed-clothes pulled smooth up to the chin, and the phial wrapped up in paper; and it was supposed impossible, after taking prussic acid, that the deceased could have done these things herself. None of these circumstances, however, appear in the preceding report of the evidence.

On the other hand, Mr. Amos notices the material fact in the prisoner's favour, that in order to administer the deadly poison, he must have opened three doors without noise, and passed through the sleeping-room of a fellow resident, the shopman of his master, in order to get at the apartment of the deceased.

Another unpublished case of poisoning is next mentioned by Mr. Amos, namely, that of James Mason, the assistant of Mr. Samuel Russell, of Blythe, who was tried at the Nottingham Assizes in 1829 for poisoning a mare, the property of Mr. Russell, by *sulphuric acid*. The following are extracts from the evidence:—

"*Edward Robinson*, a veterinary surgeon.—Saw the pony on November 7th; examined her mouth; the lips swelled; the mouth ulcerated; sloughing. I think these appearances could not have arisen from natural causes. I think sulphuric acid would produce those effects.

"Cross-examined.—Never before saw the effects of sulphuric acid on the mouth of a horse. It was Mr. Russell who then suggested that it might be sulphuric acid. Gave no opinion as to pony's life being in danger. *Any caustic would produce those appearances*; muriatic acid would. Never saw it applied to a horse. Sulphuric acid would burn clothes. It might be administered by a syringe, or bottle, if pony was quiet. Those appearances could not have been produced by natural causes; I have never seen them.

"Re-examined.—Sulphuric acid would produce such effects on other parts of a horse; I have seen it done.

"*Samuel Peach*, a veterinary surgeon.—Examined the pony on November 11th. Examined head and mouth. Ulceration and sloughing. It appeared to be from application of caustic. Sulphuric acid would likely produce those appearances. Stomach also in state of ulceration. Appearances also there. Duodenum partially inflamed. The appearances were most assuredly not from natural causes; sufficient to occasion the death of a horse. If sulphuric acid administered, effects would be instantaneous; I think it could not have been administered and pony have travelled seven miles. It would not alter appearance of mouth in less than a quarter or half an hour. I should think a horse would not eat corn an hour after application of sulphuric acid.

"Cross-examined.—Most likely she died of constitutional irritation, produced by the spots. Examined lungs. Air-vessels thickened and obliterated, from chronic disease. Lungs might have lasted a long time. Could not say what acid had been employed; if nitric acid had been used, animal could not have gone seven miles. Froth would be the effect of moving the tongue, not the caustic. Never had any doubts of cause of death of the pony; never said he would defy any man to say whether the mare was poisoned or not. The immediate effects of acids are well known to medical men.

"*Thomas de Grey Brewerton.*—Live at Bawtry; surgeon there; in the habit of making experiments in chemistry; examined pony after death. The appearances: mouth were as if corrosive liquid had been put on the tongue, and then ran under the tongue, over the lips, and out of the mouth; a similar effect was produced on stomach, at upper orifice of stomach, and duodenum. I speak of effects of corrosive liquid, not of inflammatory appearances besides. Took home with me part of the tongue, lip, and the duodenum, for purpose of trying to extract liquid made use of. The result, particularly as relates to the tongue, was, that it afforded, on chemical examination, a larger quantity of sulphuric acid than could be expected to be found either in saliva of horse or soft parts of the mouth, as they are not known to contain any sulphuric acid. In my judgment, sulphuric acid occasioned the animal's death. Have examined a healthy tongue; found no sulphuric acid in it. The effect of destroying the vitality of the surface would be instantaneous from sulphuric acid.

"Cross-examined.—I examined a healthy tongue that I might have fact as well as theory. Prisoner had once been at my house. His general reputation and character were good. I should presume that he would know that sulphuric acid would produce those effects.

"*Benjamin Robinson*, a physician at Retford, of thirty years' practice.—Sulphuric acid, I conceive, would produce excruciating pain. I should think the animal would show pain and uneasiness. I think it could not be passive. I think, if capable of living several days, would often exhibit symptoms of pain. I think it more probable that the horse would reject the acid than let it go down the throat. If the stomach was acted upon by such an acid, the œsophagus could not be in a healthy state. Cases I have heard of where the mucous membrane of the stomach has become inflamed; the result of inflammation

in the mucous membrane is ulceration and gangrene. I think it possible that inflammation may take place in mucous membrane, setting aside the detection of the sulphuric acid which has been spoken of by one witness. I am of opinion that all the other symptoms might have been produced by natural causes, without human agency: mouth sympathises with stomach. From my knowledge, the statement respecting the sulphuric acid surprised me.

"Cross-examined.—Lying down and getting up are symptoms of pain. These more a symptom of cholic and pain in the bowels. I should not suppose the getting up and lying down to be a symptom of pain in the stomach. If the evidence of the presence of sulphuric acid be true, it must have been introduced into the mouth. It is possible that part, by means of a syringe, might go down the throat—not physically impossible. A common occurrence in disease for mouth and fauces to be affected by sympathy with disease of stomach. I should think the appearance of the mouth could not have come on so suddenly from natural causes if horse had begun to eat his corn; appearances would be gradually coming on.

"Re-examined.—If the sulphuric acid administered were through a syringe, it would affect the syringe. On a leaden syringe sulphuric acid acts slowly.

"*Jonas Kewney*, a veterinary surgeon of Nottingham.—Have heard evidence of the witnesses: have heard appearances described; I think the appearances could not have arisen from natural causes; I think from application of caustic. Have frequently seen ulcerated mouths, but not that species of ulceration; have seen inflamed stomachs, occasioned by feeding on cut straw; heard gullet described; gullet would have exhibited great inflammation, if not ulceration, if sulphuric acid had passed into the stomach. From a horse lying down should think he had pain in his stomach or bowels; the lining of the gullet is not insensible, but less sensible than other parts; course of sulphuric acid would be rapid over the gullet; if the pony were eating his corn at the time, it might have passed over his gullet without producing inflammation.

"Re-examined.—If given with a syringe I should think it would not pass into the stomach; gullet two feet long: if there was corn in the mouth, the gullet would be the more likely to reject the acid.

"*John Calthorpe Williams.*—I think the œsophagus could not have been untouched if sulphuric acid had been introduced into the mouth; the evidence as to detection of sulphuric acid has quite surprised me; I should have thought it impossible to have detected presence of sulphuric acid after that length of time; I should expect the sulphuric acid would be changed by changes of body; I should scarcely think the acid could be re-produced after ten days; acid cannot be re-produced so well after put on living matter as on dead; not aware that the gullet is more insensible to chemical agents than other coats; gullet contracts when food passes; it does not go down by its mere gravity."*

* Medical Gazette, Aug. 6. 1831.

NEW CARRIERS' ACT.

1 Wm. IV. c. 68.

To the Editor of the Legal Observer.

Sir,

In the remarks on the new Carriers' Act, (1 Wm. 4. c. 68.) contained in the Number of the Legal Observer of 4th December last, it is stated that the effect of the act is to *limit* the responsibility of carriers to 10*l.*, if any of the property enumerated in sect. 1. be lost, &c. unless the nature has been declared and insurance paid. Now, the words of the section are to the effect that no carrier shall be liable for the loss of or injury to *any property* therein named, *when the value shall exceed* 10*l.*, unless, &c., which would appear to free the carrier from ALL liability where the *value of the property exceeds* 10*l.*, and is not insured; and not merely to *limit* his responsibility to 10*l.*

As I am not able to find any decisions under this act, I beg to submit some queries arising on it, for the consideration of your correspondents.

1. Will the carrier be liable to the payment of 10*l.*, where the value of the package is of larger amount, and the value was not declared, nor an insurance paid on it, as directed by sect. 1.? or is he freed from *all* liability?

2. Where the nature of the article was marked on the outside of the package, with a direction as to the mode of placing it; and in consequence of the direction not being complied with, and due care taken in the transit, the articles are damaged; would this be considered neglect or misconduct provided for in sect. 8., and take the case out of the statute?

I am, Sir, yours, &c.

A SUBSCRIBER.

Sept. 24. 1831.

LEVYING COSTS OF EXECUTION.

To the Editor of the Legal Observer.

Sir,

As the law now stands, a defendant who becomes entitled to costs either under a nonsuit, a non pros., or a verdict, cannot, under a writ of execution for such costs, include in the levy the costs of the writ, or the sheriff's poundage,—a disadvantage which does not attach to the plaintiff's costs, unless the writ of execution be against the person.

As it is generally understood in the profession that this anomaly arose, in the first instance, from inadvertence in the framing of the statute, there seems no good reason, now so many bills for the amendment of the law are before the legislature, why plaintiffs and defendants should not be placed on the same footing in this respect. The distinction bears peculiarly hard upon defendants on costs of non pros., for not declaring which amount only to 50*s.*, the expense of recovering which (to be borne, be it remembered, by the successful party) are nearly as much.

J. B. T.

BANKRUPTCY OF TENANT FOR LIFE, WITH POWER OF APPOINTMENT.

To the Editor of the Legal Observer.

SIR,

I ENCLOSE you the note of a case argued in the Common Pleas last term; it will be interesting to many of your readers, and will, I trust, induce some one of them to inform us whether any certificate has yet been sent by the Judges; and if so, what?

I am, Sir, your obedient servant,

†

A. was tenant for life, remainder to trustees to preserve contingent remainders, remainder to *A.*'s first and other sons successively in tail, remainders to the daughters in tail, with cross remainders, remainder to *A.* in fee, with a power to *A.* to revoke and appoint such estates as he should please among the children. *A.* became a bankrupt; the usual proceedings were had thereon. Afterwards he appointed to his children as tenants in common in fee simple, and the question was, Did the children take any estate? and if so, what?

Spankie Serjt. maintained, 1st, That they took in fee; for that though the assignees under the commission took all the estate *A.* had, yet they did not, and could not, take a greater. Now, *A.*'s remainder in fee was liable to be superseded by an appointment, consequently it must remain so liable in the hands of the assignees.

2dly, That the appointment gave the children, if not a fee simple, at least a base fee, by which construction the remainder would not be devested out of the assignees, but would be expectant, as before, on the failure of *A.*'s issue.

3dly, That this power, being for the benefit of third parties (*i. e.* the children), could not be destroyed by any means; and he quoted *Edwards* v. *Slater*, Hard. 410.; *Digges'* case, 1 Co. 174.; a dictum by Lord Redesdale, in 2 Bligh, 1 Ser. p. 18.; and Sugden on Powers, 3d ed. p. 187.

Taddy Serjt. insisted that the power was destroyed by the bargain and sale to the assignees, and he dwelt much on the words of stat. 13 Eliz. c. 7. § 2. and 21 Jac. 1. c. 19. § 12.; and said, that if *A.* could not destroy the power, it would be inconvenient, for then he and his eldest son could not have made a valid settlement — that he might have released this power, for that it was to a certain degree beneficial to himself — that he was not a trustee compellable to execute, but had an option, which he should not be allowed to exercise in order to defeat an estate given by law to the assignees. And as to the second part of the argument, he said, that a base fee could not be appointed, for that a fee cannot be mounted on a fee by the act of the party; and that an estate appointed under a power takes effect as if contained in the original deed; that in no deed could a remainder have been limited on a base fee, therefore it cannot be so by the exercise of a power; and that if the children have a base fee, the assignees *must* lose the remainder — for it cannot take effect *as* a remainder, being on a fee; and how else is it to be supported? And he quoted *Smith* v. *Death*, 5 Madd. 371.; *King* v. *Melling*, 1 Vent. 1 Co. 174 a.; *Thorpe* v. *Goodall*, 17 Vesey, 368. Co. Litt. 237 a. 18 a.; *Seymour's* case, 10 Rep. 97 a.

NOTES OF THE WEEK.

GENERAL REGISTER BILL.

THIS bill, intituled a bill "for establishing a General Register for all Deeds and Instruments affecting Real Property in England and Wales," has been presented to the House of Commons, read a first time, and ordered to be read a second time.

It must be acknowledged that ample time has been allowed by the learned proposers of this measure for its mature consideration. A full analysis of it was given so long ago as the month of January last, Vol. I. pp. 180. 195., with the general heads and subdivisions of the bill, which will enable the reader to take a ready and accurate view of the plan and its several details. As numerous articles, both for and against a Registry, were inserted on the occasion of its former proposal*, we should be desirous to avoid a repetition of the arguments and objections there adduced; but with this reservation our pages will be open to the temperate discussion of the matter on both sides.

SUPERIOR COURTS.

LORD CHANCELLOR'S COURT.

LIABILITY OF EXECUTORS.

If a testator directs his executors to invest moneys within six months after his death, and they neglect to do so for several years, they or the survivor of them will be chargeable with interest on the balances in their hands; and for any sums lost by placing them in their banker's hands, although no fraud be proved.

THIS was an appeal from a decree of the Vice Chancellor, directing the defendant, the survivor of three executors, to pay the interest upon the balances of the trust moneys found by the Master to have been in the hands of the executors from time to time; and also to refund a sum of 500*l.* which had been deposited in the hands of Messrs. Mainwaring and Co., bankers, at the time of their failure.

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* Vide Analytical Table of Contents, "Law Reform — Metropolitan Registry of Deeds."

Sir *C. Wetherell* and Mr. *Parker* appeared for the appellants.

Mr. *Solicitor General*, Sir *Edward Sugden*, Mr. *Pepys*, and Mr. *Wray*, appeared for the respondents.

The *Lord Chancellor* said that nothing was more clear, in his opinion, than that the judgment of the Vice Chancellor was right. An executor's responsibility was individual, but he might make it a joint responsibility with his co-executors, if he acted with them. It appeared that the defendant had, in the first instance, joined with Mr. Hinley, another executor, in drawing the 500*l.* out of the banker's hands, for the purpose, as he stated, of laying it out in the purchase of two annuities. Mr. Hinley invested it upon a mortgage; and when the defendant became acquainted with that fact, he insisted on its being restored, and it was then paid into the bankers' hands, where it had been only four days when they failed. Now, the directions of the testator were, that the produce of his estates should be laid out, at the end of six months, in the purchase of government securities; so that the application of the sum of 500*l.* which the defendant sanctioned, was as little authorised by the testator's will as the mortgage, of which Mr. Reid had disapproved. It was not extending the principles of the Court too far, therefore, to say that he must guarantee the sum which he had so placed in peril. The bankers were not the bankers of the testator; another circumstance to which the Court always looked in such cases. The testator having expressly directed that the produce of the estate should be laid out at the end of six months, the Master was right in certifying to the Court, that the executors had held balances from 500*l.* to 4000*l.* in their hands, on the 1st of January, during a period of several years after the testator's death; and as there was no explanation why the executors had delayed, during so many years, to do what they ought to have done at the end of six months, he thought the surviving executor was liable to be charged with interest. For these reasons he affirmed the decision of the Vice Chancellor, with the costs of the suit; but with respect to the costs of the appeal, he should not order them in favour of the representatives of the other executors, who were at least as culpable as the defendant. There was nothing to affect the moral character of the defendant.—*Newton* v. *Reid*. June 16. 1831.

ROLL'S COURT.

AGREEMENT.—LEASE.—SPECIFIC PERFORMANCE.

An agreement for a lease will not be specifically performed, when, if the lease had been prepared, a covenant would have been introduced which the intended lessee has broken.

In this case the bill was filed for the purpose of obtaining, under the decree of the Court, a specific performance of a contract that had been entered into under the following circumstances:—In the year 1781, Sir Edward Ball Mansell, being entitled to a certain estate called Bynea Farm, in the county of Carmarthen, entered into an agreement with a person of the name of Smith, to grant a lease of that estate for a term of 80 years, at the annual rent of 40*l.* Smith, by virtue of this agreement, took possession of the property, which he occupied till his death. By his will he gave all his interest to two of his sons, who in 1806 sold all their interest to General Ward, from whom the plaintiff had acquired his rights. Sir Edward died, leaving the whole of his property to his widow, through whom this estate ultimately descended to the present defendant. It appeared that there never had been any objection made by the owners in reversion, to the validity of the agreement under which the lessees had so long continued in possession, until the property came into the hands of the present defendant, who had commenced an action of ejectment to recover possession. The objections made to the performance of the contract were, that Sir E. Mansell was a person of weak understanding, not fit to enter into a contract for the disposition of his property; that this was an agreement for an inadequate consideration; that being in possession under an agreement for a lease, the plaintiff had been guilty of acts which would have forfeited a lease if granted; and that therefore there was a right on the part of the defendant to recover possession of the property.

Mr. *Bickersteth* (with whom was Mr. *Walker*) appeared for the defendant. At the time when the contract was entered into, there had been a provision inserted in the agreement, for the erection of premises for the refining of copper ore; but that provision, in consequence of the resistance of the entitled lessor, had been obliterated. The plaintiff, however, had, to the great deterioration of the estate, erected these premises; and the question was, whether, if a lease had been granted immediately after this agreement was entered into, a covenant would not have been inserted, in pursuance of the original terms of that agreement, in respect of the breach of which the defendant would be entitled to enter into the possession of the property.

The *Master of the Rolls* was of opinion that if a lease had been immediately executed, the defendant, or those who then represented him, would have been entitled to a covenant to restrain the building of such premises as had been erected, in those terms which were stated in the contract originally, but struck out at the time the agreement was made, in consequence of the resistance of the intended lessor. The plaintiff was bound by the terms of his contract to "use the land in an husbandlike manner;" but by the erections he had raised, the property had been used in a most unhusbandlike manner, and the bill must, therefore, be dismissed with costs.—*Tunno* v. *Lewis*. M. R. June 10. 1831.

COURT OF KING'S BENCH.

HAWKERS AND PEDLARS ACT, 50 GEO. 3. c. 41.

If a party send timber from a town to an extra-parochial division, and there has it sold, he having no licence, he is within the penalties of the 50 Geo. 3. c. 41. §§ 6. & 7.

Upon an appeal against a conviction of the defendant under the Hawkers and Pedlars Act, 50 Geo. 3. c. 41., the sessions quashed the con-

viction, subject to the opinion of the Court upon the following case:—The party convicted was a timber merchant living at Leeds, who, having purchased a quantity of mahogany at Hull, sent it by water to Nottingham, where it was deposited in the extra-parochial division the Castle of Nottingham. He there employed an auctioneer to sell a considerable part of it, having no licence himself; and the question for the opinion of the Court was, whether the appellant was a hawker within the statute of the 50 Geo. 3. c. 41., the sixth section of which statute imposes an annual duty of 4*l.* to be paid "by every hawker, pedlar, petty chapman, *and every other trading person and persons going from town to town*, or to other men's houses, and travelling either on foot, or with horse, horses, or otherwise, &c., and an additional duty of 4*l.* on every person so travelling with any horse, ass, &c. for each horse, &c." The seventh section prohibits persons so travelling from opening a shop or room, or selling by retail, or by an auctioneer or agent, any goods in any town, parish, or place, the same not being an usual place of his or her abode, under a penalty of 50*l.*

Balguy and *Tomlinson*, in support of the order of sessions, contended that this was not a case within the statute. That although it might be endeavoured on the other side to represent him as a person trading from town to town, there was not an act of trading in this case, but the mere act of selling timber within this extra-parochial place; and there was no second town, therefore, sufficient to satisfy the words of the statute, from *town to town*.

Lord *Tenterden* C. J. A corporate town is not mentioned; a village would do, and there are extra-parochial villages.

Tomlinson. This constitutes no part of the town of *Nottingham*. Then, too, there was but one act of offering to sale, which had been decided in *Rex* v. *Little*, 1 Burr. 609., to be not sufficient to make a man a hawker. The object of this act was to protect the resident tradesmen, whom a sale of this description could not injure. All the cases decided were of manufactured articles, to which, and to articles fit for immediate consumption, the statute only applied, and not to goods which are mere raw commodities in bulk, and require further process to fit them for the consumer.

N. R. Clarke and *Clinton*, *contrà*, were stopped by

The *Court*, who held, that the words of the act were very large, and they thought the defendant within the meaning of them.—*Rex* v. *Pese*. M. T. Nov. 18. 1830.

ATTORNEY'S SERVICE UNDER ARTICLES.

Where an attorney has been prevented only for four months, by unnecessary delay attending the proving of the will of the party to whom he was articled, from serving under articles, he cannot be admitted, without serving those four months under articles.

Patteson applied to the Court to admit a party an attorney, under the following circumstances:—William Cardale, the attorney to whom he had been articled, and whom he had served for some time under the articles, died in September, 1826, and a period of four months from that time elapsed, during which the party had no legal master, in consequence of some delay attending the proving of the will. John Cardale, the son of his original master, then succeeded to the business, and he was then articled to John Cardale for the remaining period of the term, but without noticing the four months.

Lord *Tenterden* C. J. The act requires a service of five years under articles: that has not been done here. He must serve the four months under articles.

Application refused.—*Ex parte* ———. H. T. Jan. 26. 1830.

MANDAMUS.—POOR RATE.

The Court will grant a peremptory mandamus *in the first instance, commanding parish officers to sign a poor rate, where it appears that, unless the rate is collected, the parish fund for the relief of the poor will fail.*

Brodrick applied for a *mandamus*, absolute in the first instance, to some of the churchwardens of the parish of *Soham*, in Cambridgeshire, commanding them to sign a rate for the relief of the poor. It appeared by the affidavits, that a rate had been made, which had been appealed against at the last session, and quashed. A new valuation and rate had subsequently been made, but which a part of the parish officers refused to sign. It was further stated, that the parish were under the necessity of relieving 700 paupers every *Friday*, but they had not now sufficient funds for that purpose, nor would they have sufficient by the next *Friday*, unless the poor rate were collected.

Bayley J. doubted whether a peremptory *mandamus* could be granted at once; but *Brodrick* referred to *Rex* v. *Fisher and others*, Sayer, 160., where the point was decided; and *Bayley* J. then granted the *mandamus*, but said that it must be directed to all the parish officers.—*Rex* v. *Churchwardens of Soham, Cambridgeshire*. H. T. 1830.

DUEL.—MALICE.—SECOND.—MURDER.

If a party act as second to another in a duel, and that other is killed therein, his conduct is sufficient to support the allegation of malice in an indictment for murder.

The prisoner, Lambrecht, was indicted for the murder of Oliver Clayton in a duel; and the other prisoners—Cox, second to Lambrecht; and Bigley, who had been second to Clayton—as accessories before the fact.

Nothing turned upon the circumstances of the case, which it is therefore unnecessary to detail; but after the case for the prosecution had been closed,

Clarkson, for the prisoner Bigley, submitted that there was no evidence to convict him of murder; that he was charged by the indictment with being guilty, with the others, of the common purpose of killing Oliver Clayton, which was negatived by the evidence, as it appeared that he acted as his friend and second. In support of this argument, he cited 1 Russ. 444., who refers to the opinion of Lord Hale, who appeared to think the law too far strained in this instance. 1 Hale, 442.

Bayley J. held, that it was a question for the jury; and proceeded to sum up. After stating the indictment, he observed that it was material to explain the legal meaning of *malice*. It is not that which is generally understood by the phrase "*bearing malice* towards another;" but if a man does intentionally a wicked act, and such as implies a wicked mind — as if a man intentionally kill a person whom he don't know — that is, in law, malice. So, if a man intentionally does an act which is calculated to produce death, and death do ensue, although the party killed were the friend of him who did the act, that is malice aforethought, and sufficient to constitute the crime of murder. There is no doubt, if parties go out with deadly instruments, and they are used to produce death, that will be murder. An objection was taken, that one of the prisoners was the friend of the man who was killed, and therefore could have entertained no malice against him; but the jury were to consider whether he was aiding and abetting in a common purpose, and then to see what that purpose was. Here, if the common purpose had been to kill Clayton only — if his life alone was to have been put in hazard — it would not have been murder in his second; but if the purpose was to put the lives of the two into hazard, and if that common purpose be proved, the second is equally guilty with the others. The points for the consideration of the jury, therefore, were — 1st, What was the cause of the death of Clayton? 2dly, Were the prisoners guilty of the act? There was no question but that efforts had been made by the prisoner to avoid the duel; but reluctance on the part of some parties, and the obstinacy of the party who falls, would not alter the nature of the offence, which still amounted in law to the crime of murder. It was quite clear, that however unwilling to resort to the means afterwards adopted the parties might have been, yet if extremes were resorted to, although the personal criminality were smaller, the crime was the same.

The jury were out for nearly four hours, and at length returned a verdict of *Not guilty*.

Gurney, *Brodrick*, and *Thesiger*, for the prosecution; *Adolphus* and *Platt*, for Lambrecht and Cox; *Clarkson*, for Bigley. — *Rex* v. *Lambrecht and others*. Surrey Spr. Ass. 1830.

ATTORNEY. — UNDERTAKING.

An attorney giving an undertaking for another, in a cause wherein he is not concerned, will not be forced summarily to fulfil it, but the party to whom it is given will be left to his action.

Platt showed cause against a rule obtained by *Richmond*, requiring Mr. *Henry Hamilton*, an attorney of the Court, to show cause why he should not fulfil his undertaking for the debt of a person named *Arlett*, an attorney at *Ware* in *Hertfordshire*. An action by bill had been brought against *Arlett* for a sum of money recovered by him for one of his clients. *Aslett* gave a *cognovit*, but the money was not paid under it. *Arlett*, accompanied by *Hamilton*, went to the attorney for the plaintiff, and the latter offered his undertaking for the debt. It was accepted, and the object of the present application was summarily to enforce that undertaking. It was true that *Hamilton* was the general agent of *Arlett*, but was neither agent nor attorney for him in the present instance. The undertaking was therefore the common guaranty by one person for another, on which he would be liable, if, by the *statute of frauds*, the parties were entitled to recover upon it. In the case of *Bursell* v. *Jones and another*, 3 Bar. & Ald. 47., an action was brought, and successfully maintained, against two attorneys, on their undertaking on behalf of their clients. The fact of Mr. *Hamilton* being an attorney made no difference. The party must be left to his action.

Richmond appeared in support of the rule.

Patteson J. It seems to me that this is a mere undertaking, which the Court ought not to interfere to enforce summarily. It is one in which an action would lie. The undertaking was not given professionally, as an attorney in the cause, for this was not one in which he was engaged, but one in which he acted merely as a friend. The rule must therefore be discharged, but without costs, as the undertaking ought to have been performed.

Rule discharged, without costs. — *Walker* v. *Arlett*. T. T. May 24. 1831.

EJECTMENT. — SETTING ASIDE JUDGMENT AND EXECUTION.

The Court will not set aside the judgment and writ of possession against the casual ejector, in order to admit a party making an affidavit of merits to defend, on payment of costs.

Talfourd showed cause against a rule for setting aside judgment against the casual ejector, and the writ of possession executed on payment of costs. A previous ejectment for the same premises had been brought, and abandoned, and then the declaration in this case had been served. The tenant in possession did not appear, and judgment and execution followed. Now, in the case of *Doe dem. Ledger* v. *Roe*, 3 Taunton, 506., the Court refused to set aside a judgment and execution in ejectment, in order to let in a person to defend, though he made an affidavit setting forth a clear title, and offered to pay costs. That case was recognised in 2 Tidd, 1225. ed. 9. The present application was founded on the common affidavit of merits. It was difficult, therefore, to see how the present application could be successful, after the case just quoted.

Patteson J. asked *White*, who appeared in support of the rule, how he distinguished this case from that in Taunton.

White, in support of the rule. I distinguish this case from that in Taunton, on the merits. We swear that the property in dispute was bought with our money, and that it is now sought to turn us out of possession. The present application is like a common one for setting aside any other regular judgment, on payment of costs.

Patteson J. I don't see how I can do it. I cannot do it without overruling that case in the Court of Common Pleas.

Rule discharged, without costs. — *Doe* v. *Roe*. T. T. May 24. 1831.

PRACTICE COURT.

ARBITRATOR.—AWARD.—COSTS.

Where an award was taken up by one party, and all the costs paid to two out of three arbitrators, the third arbitrator has no remedy against either party in the cause.

An arbitrator has no action for his fees.

Kelly showed cause against a rule obtained by *Palmer*, calling on the plaintiff and defendant to show cause why they should not pay a Mr. *Cully* the sum of 50*l.*, or such other sum as should be found due, on taxation for his services as an arbitrator. The facts set forth in the affidavits are the following:—The cause had been referred at the *Norfolk* assizes to three gentlemen, Mr. *Cully*, Mr. *Pratt*, and Mr. *Evans*, a barrister, the two former gentlemen not being in the legal profession. An award was made by Mr. *Pratt*, and Mr. *Evans*; Mr. *Cully* not choosing to attend and join in it, from conscientious motives. The award orders, that the parties shall each pay their own costs, and that the costs of the award shall be paid in moieties, by the plaintiff and defendant. The amount of the costs of the award was 113*l.* These were paid by the defendant. It does not appear how much was paid to each of the two arbitrators. Now, the third arbitrator, Mr. *Cully*, who did not join in the award, says he ought to be paid a share. But if he has any remedy, his only one is by action. The rule of Court empowers the Court to enforce the award. It has been enforced, by the payment of the costs, according to its direction. Therefore, the Court has no longer any jurisdiction. This application refers to matter entirely *dehors* the award, and is wholly without precedent. It is, in fact, merely a speculation to try and induce the Court to interfere in that over which it has no jurisdiction. The rule, therefore, ought to be discharged with costs.

Palmer, in support of the rule. When two persons are appointed arbitrators, they are arbitrators for both parties. The arbitrator becomes a party to the rule of Court, and there is an express promise, in fact, created by the rule of Court to pay the arbitrator. In a case in the Common Pleas, of *Hicks* v. *Richardson*, 1 Bos. & Pul. 93., a motion was made for an attachment against the plaintiff for not performing an award.

Taunton J. That case is materially different from this. There the money due to the arbitrator was actually paid.

Palmer. In that case *Eyre* C. J. says, "Shall we oblige the arbitrator to bring an action? Should we not have allowed him to say on this sort of application, that the costs of the arbitration amounted to so much, and that, by the terms of the award, they were to be paid by both parties, and that this plaintiff had refused to pay his moiety? I consider this motion in the same light as if the arbitrator had come to enforce the attachment. On the substantial justice of the case the plaintiff is bound to pay his moiety of the costs. He has submitted by a rule of Court to pay them, and the Court will enforce the payment by attachment. It is a matter of form, whether the arbitrator himself applies for the attachment, or the party who has paid the money to the arbitrator. I cannot but think that it was the better course to be taken in this case for the arbitrator to get the whole costs, by withholding the award from the defendant, who may redress himself, by one attachment, than for the defendant to have an attachment against the plaintiff for not obeying the award, as far as concerned him, for the moiety of the costs of the arbitration. What a scene of litigation, expense, and vexation, might this strictness produce? Supposing no objections to the expenses themselves, I think the attachment should issue."

Taunton J. But there one party had paid all the costs, and the Court ordered that each party should pay a moiety according to the direction of the award. He had a right to contribution there, because he had paid all the costs. The arbitrator there had no grievance of which to complain, as he had been fully paid.

Palmer. I submit that this application, founded on the case I have cited, ought to entitle me to have my rule made absolute. Where an arbitrator has attended, meeting after meeting, and then thinks he cannot reconcile his conscience to the award, he is still entitled to receive a fair remuneration for his services. Who will undertake the office of arbitrator, if he is to be turned round in this manner, and receive nothing for his trouble? As to the proportion of the money paid as costs of the award, which the arbitrator would be entitled to receive, the Court has power to determine that by taxation. In the case of *Barrett* v. *Parry*, 4 Taun. 657., the prothonotary expressed an opinion to that effect.

Taunton J. I am of opinion that this rule must be discharged. I intimated, when it was moved, that it appeared to me an application of the first impression. For I remembered one case, before I came to the bar, in which, I had a distinct recollection, Lord *Kenyon* ruled, that the office of arbitrator was altogether honorary, and that an arbitrator could not maintain an action for his fees. And on that occasion the plaintiff, who sued for his fees as arbitrator, was nonsuited. But it is not necessary to give an opinion on that point in this case; because, admitting that an arbitrator is entitled to remuneration for his trouble, here, that, to which these arbitrators are entitled, has been paid. The award orders that the costs of the award shall be paid in moieties. One moiety is to be paid by one party and another moiety by the other. Then the party, in whose favour the award is made, applies to one of the arbitrators to know the amount of the charges of the award, and he tells him 113*l.* That sum is paid by the person who so applies, and the arbitrator gives up the award to him. The charges are paid to the arbitrator, who would not have delivered up the award without payment. If this 113*l.* has been improperly divided between two, instead of among three, that is a matter between themselves and the gentleman who has had the misfortune not to get any thing. If so advised, he may bring an action for his share. That he may do, though I give no such advice. If Mr. *Cully* is entitled to any

thing, his only remedy is against the arbitrators. The case in 1 Bos. & Pul. is perfectly different from this. There an application was made for contribution, and the Court ruled that the party who had paid the whole costs was entitled to an attachment for the nonpayment of contribution. What is said by *Eyre* C. J. went beyond the case, and whatever dropped from him, therefore, was extra-judicial; and I apprehend there is no reason for any such observations. The rule must, therefore, be discharged; and as this application is merely experimental, it must be discharged with costs.

Rule discharged, with costs. — *Burroughes* v. *Clarke*. E. T. May 4. 1831.

Before the Four Judges.

EJECTMENT. — 11 GEO. 4. AND 1 WILL. 4. c. 70. § 36. — PRACTICE.

Where a landlord's right of possession accrues on the day after essoign day of Trinity term, he is not entitled to serve a declaration in ejectment of that term under the 11 *Geo.* 4. *and* 1 *Will.* 4. *c.* 73. § 36.

Milner moved for judgment against the casual ejector, under the 11 Geo. 4. and 1 Will. 4. c. 70. § 36. The words of that section are, "that in all actions of ejectment hereafter to be brought in any of his Majesty's Courts at *Westminster* by any landlord against his tenant, or against any person claiming through or under such tenant, for the recovery of any lands or hereditaments, where the tenancy shall expire, or the right of entry into or upon such lands or hereditaments shall accrue to such landlord in or after Hilary or Trinity terms respectively, it shall be lawful for the lessor of the plaintiff in any such action, at any time within ten days after such tenancy shall expire or right of tenancy accrue as aforesaid, to serve a declaration in ejectment entitled of the day next after the day of the demise, in such declaration, whether the same shall be in term or in vacation, with a notice thereunto subscribed, requiring the tenant or tenants in possession to appear and plead thereto, within ten days, in the Court in which such action may be brought; and proceedings may be had on such declaration, and rules to plead entered and given, in such and the same manner, as nearly as may be, as if such declaration had been duly served before the preceding term." Here, however, the right of the landlord did not accrue until the 20th of May, which was the day after the essoign day of *Trinity* term. Now, the essoign day, and the intermediate days between it and the first day in full term, were for some purposes part of the term. The right of the landlord, therefore, must be taken as having accrued within *Trinity* term; and the declaration, which had been delivered within the term, complying with the directions of the above statute, was regular, and therefore the lessor of the plaintiff was entitled to judgment of *Trinity* term against the casual ejector.

Parke J. By the 6th section of that act, the term began on the 22d of May; and, therefore, the right of the landlord in this case did not accrue "during" Trinity term, and therefore the statute does not apply.

Milner. The landlord will, therefore, be driven over to *Michaelmas* term, because, by the rule of Court, all declarations in ejectment must be served before the essoign day, or the plaintiff will not be entitled to judgment of the term.*

Lord *Tenterden* C. J. Those three days are a *casus omissus* in the statute, and therefore we cannot interfere.

Rule refused. — *Doe* v. *Roe*. T. T. June 3, 1831.

COURT OF COMMON PLEAS.

EVIDENCE. — STEWARD'S ENTRY.

Entries in the book of the steward of a manor, of fines assessed, whether paid or unpaid, are not evidence of the payment of those fines.

This was an action of *assumpsit*, brought to recover certain copyhold fines. The issue was, whether, the tenant for life having paid a fine in respect of certain property, the remainder-man was liable to pay another in respect of the same property, when he came into possession. On the trial of the cause, the plaintiff produced a book from the possession of the steward of the manor, in order to prove the payment of fines by remainder-man. This book the steward had received many years before, from his predecessor, and it had always remained among the muniments of the manor. In the book were entries of all fines, whether paid or unpaid, which had been assessed. All the tenants of the manor had access to it. But, at the end of every year, another book was made out by the steward, containing entries of the fines actually paid. This book was rejected at the trial by the learned Judge, and

Stork, Serjt. moved for a new trial, as he contended the book should have been received in evidence. It was an ancient document, which came from the proper custody; a public writing, to which all the tenants of the manor could have access; it was a record of the Manor Court. It also contained entries contrary to the interest of the steward; for after he had entered the fines, he must account with the lord of the manor.

Tindal C. J. How are we to say whether the fines were ever paid or not? This evidence is purely conjectural. It cannot be said that the book contains evidence of the steward's having charged himself; for he made up a second book at the end of each year, in which he put down the fines actually paid. It would be exceedingly dangerous to admit the book in question; for, if it were admissible, a steward might, by a series of entries, increase the extent of the tenant's liability.

The other Judges concurred. — *Dean and Chapter of Ely* v. *Caldecott*. E. T. April, 1831.

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* *Roe dem. Bird* v. *Doe*, Barnes, 172. 2 Tid. Prac. 1210. ed. 9. According to the new rules, however, the plaintiff would not be driven over to *Michaelmas* term, as, by the 11th rule, declarations in ejectment may be served before the first day of any term, and thereupon the plaintiff shall be entitled to judgment against the casual ejector, in like manner as upon declarations served before the essoign or first general return day. See 2 L. O. 180. Supp. for June, 176., and 1 Dowling's Stat. 387.

ANSWERS TO QUERIES.

FILIATION—BANKRUPT. P. 287.

I CONSIDER that the obligor in the bond is not absolved by bankruptcy, and that your correspondent, H. B. A., has given too liberal a construction to the 7 Geo. 1. c. 31., cited by him in his answer (page 319.); for in the case of the *Churchwardens and Overseers of the Parish of St. Martin's* v. *Warren*, 2 Starkie, Ni. Pri. page 188., which was an action brought against the defendant, as surety, to recover the amount of expense of supporting the bastard child of one Lawrence, the defendant pleaded his bankruptcy and certificate; the question was, whether the action was barred by the bankruptcy of the defendant, and his subsequent certificate. *Bayley* J. was of opinion, that the action was not barred, but saved the point for the opinion of the Court, and a verdict was given for the plaintiffs, which the Court of King's Bench next Easter term confirmed. W. S.

DAMAGE FEASANT.—REPLEVIN.

One of your correspondents, at p. 244, stated a hard case respecting a distress taken *damage feasant*, I know of no remedy afforded by the law, as it at present stands; but he will find, in p. 50. of your *Appendix*, the following contemplated provision for it:—It is proposed, "That in replevin the plaintiff shall be at liberty to plead in bar a tender of the rent and costs, *or of a sum* for damages and costs (as the case may be) *after-impounding*; or to pay into Court, in either case, such sum of money as he shall think fit."—*Third Report of the Common Law Commissioners.*

QUERIES.

NEW RULES.—LENGTH OF DECLARATION.

By the late rules for diminishing the length of declarations, it is ordered, "That if any declaration in *assumpsit* hereafter filed, &c. shall exceed in length such of the said forms set forth in the schedule as shall be applicable to the case, no costs of such excess shall be allowed," &c. I beg to enquire whether it will be requisite to put the usual commencement to a declaration, *viz.* "*A. B.* complains of *B. C.* being," &c.? and how the declaration is to conclude, "To the damage of plaintiff of," &c., if those forms are strictly followed? W. H.

RENT. — BANKRUPT.

A. takes a house of *B.* on a lease for ten years, and before the expiration of the lease *A* is arrested, and takes the benefit of the act, but *A.*'s family remain in the house, and his friends pay the rent and taxes. In giving up his property, *A.* includes this lease (though of no value). No assignee was appointed. On his liberation, *A.* goes back to his house, and enters a fresh quarter. Can he be compelled to keep it for the unexpired term? or, by giving six months' notice, can he quit possession?

ATTORNEY'S LIEN.

Can an attorney prove under a client's estate for his bill for business and money lent, and receive the dividends, and still retain any papers, deeds, &c., in his possession until his demand is paid in full? The attorney is dead; but I presume his executors stand exactly in the same situation. Z.

COMMENCEMENT OF ACTION. — TENDER.

A country attorney instructs his agent in London to sue out a writ of *capias*, which is accordingly done. On the same day that the writ was issued, and between the hours of eleven and twelve in the morning, the defendant in the country makes a tender of the debt to the plaintiff. Is the tender good or bad, as regards the commencement of the action? Z.

PROMISE OF MARRIAGE.— INFANT.

Will an action for breach of promise of marriage lie against an infant (age 19)? or can he plead his minority? H. C. N.

MARSHALSEA COURT.

Is it in contemplation to throw open the Marshalsea Court? it would be beneficial to the public and the profession. J. B. S.

MISCELLANEA.

ANCIENT LEGAL EXERCISES. — MOOTS.

FOR a vacation exercise, the first moote, and the last tender of the moot in that vacation in the library, is alwayes upon one argumentable quere; and all the residue of the exercise of vacations in the library is to be upon two argumentable points; and besides, the *puisne barrister*, after the case brought in, repeates the pleading verbatim, and takes as many exceptions to the insufficiency of the pleading as he can; and all this *extempore*.

The second barrister answers those exceptions taken by the first; and takes as many more exceptions as he can; and then argues the points in law, contrary to the first barrister's argument.

The third barrister is to repeat all the exceptions taken by both the puisne barristers; and those which he conceives to be good in law he allows, and disallows of the contrary. Then, if he finde any more exceptions than were formerly moved, he shews those exceptions, and then argues the points in law, as he takes the law to be in his own opinion. Immediately after the argument ended in the library, as afore, the barristers repair to their table in the Hall, and sit there according so their antiquity; to whom the inner Barr, and those that brought in the case, resort; and there the most material exceptions spoken of in the library are again touch't: and if any material exceptions were admitted by the barristers in the library, then it may be moved there; and there the gentlemen that brought in the case, may make answer to the exceptions that were taken, and maintain the pleading to be good in law, notwithstanding those exceptions, if he can.—*Dugdale's Orig. Jurid.* p. 159.

The Legal Observer.

VOL. II. SATURDAY, OCTOBER 15. 1831. No. LI.

"——— Quod magis ad nos
Pertinet, et nescire malum est, agitamus."
HORAT.

WHO IS TO BE LORD CHANCELLOR?

WE are again called upon to resume the subject which we touched upon in our last Number — the character and merits of the present Lord Chancellor. The events of last Saturday will long be remembered. The results must be important; they may be sudden; and the question the most frequent in the mouths, if not of all men, at least of the members of the profession to which we belong, is the one at the head of this article. The answer is readily given: it is the unvaried one which has been echoed to the question — THE PRESENT LORD CHANCELLOR MUST REMAIN IN OFFICE.

We have been ever ready to try Lord Brougham by severe tests. We have not scrupled constantly to question, and, in many instances, to oppose his public conduct and public measures, whenever it was necessary or likely to serve any good purpose. The same feeling that actuated us then must actuate us now; and guided by that, we have no hesitation in asserting that it is necessary to the safety of the country, to the existence of the constitution, and to the well-being of every interest in the state, that Lord Brougham be continued in office. We leave to others the easy task of proving this in relation to other matters; it will not be necessary for us to expend many words in showing that it is true so far as relates to profession of the law, and the happiness and welfare of its members.

We will ask our readers, then, to look back upon the state of the Court of Chancery but ten months ago. Let them see two, at least, of the three Judges sinking under their labours; the arrears accumulating; the lists lengthening. Let them remember the period which elapsed between the time that the cause was ripe for hearing, and the time of its being heard; let them remember — for who should know it better than our readers — the effect that this state of things had upon the suitors and upon the public, the general clamour against our laws and all legal constitutions, and the share of reproach under which all branches of the profession laboured. Let them look back, we repeat, upon this gulf of misery, confusion, and despair, and ask how seldom they could hope for benefit from entering its limits; with what hesitation an equity suit was undertaken by a suitor; and how seldom it terminated — if it did ever terminate — to his satisfaction.

"Lasciate ogni speranza voi che'ntrate,"

was as familiarly applied to the Court of Chancery as to Dante's Pandemonium, so that one almost forgot for which place of torture it was intended as the device.

Let them turn to it as it now stands. Are not the clouds rolled away? Is not the mist dispelled? The doors are indeed closed—but why? because, far from there being any arrear, there is positively nothing for the Judge to do until November shall arrive. Need we point out the benefits of this to every member of the profession — to every man in the country. The clamour against law and lawyers is daily abating; confidence is restored; the cause of reproach is taken away, nay, converted into a cause of triumph. There cannot be a man who does not feel some exultation at this. We are not now going to mention the other benefits which the present Chancellor has conferred on his country and on the profession. This one is sufficient for our purpose. He has converted what was formerly used as a two-edged sword against us, into a shield of defence. In the day of doubt this must

be remembered: ungrateful should we be if we forgot it. It is no time to remember his faults or errors. These we have not been slow, at the proper time, to point out. Once again firmly established in office, we shall not forget them; but at present there is only one thought, one hope, one eager and ardent desire, we believe, in the country, and among all disinterested professional men; that whatever other changes may take place, the present Chancellor shall remain in. We neither mention his merits nor his faults: we have merely one assertion on the subject,—that he has done what no other man has done; he has done, and will do, what no other man can do; he has despatched the existing arrears of his Court, and will in future be able to dispose of its business. In the existing state of the Court of Chancery he is absolutely necessary: *he is the only man who can perform the duties of Lord Chancellor.* This has been proved. We shall draw no invidious comparison; but who will deny it? We repeat, then, the Lord Chancellor is necessary to the country; he must remain in office.

THE CHANGES EFFECTED IN THE LAW DURING THE LAST SESSION OF PARLIAMENT.

No. I.

TERMS AND RETURNS OF WRITS.

We have, in our Monthly Records, printed the principal Acts of Parliament of the last session; but our limits, narrowed by more pressing objects, have prevented our noticing as they deserve, and as we could wish, the changes effected by those acts in the law, as it stood at the time they passed. It is, therefore, our intention to devote some pages of this, and of the two or three succeeding Numbers, to that purpose. This may, perhaps, not be unacceptable to our readers, now that the 2d of November is at hand, for they will thus the more readily perceive what are the new weapons they must use in the approaching legal campaign.

The first act to which we shall call attention is chapter 3.* That act was brought in by Lord *Tenterden*, to amend the 11 Geo. 4. and 1 W. 4. c. 70., entitled, "An Act for the more effectual Administration of Justice in *England* and *Wales*," introduced in the previous session by Sir *James Scarlett*. The 1st section of this act repeals the 6th section of the 11 G. 4. and 1 W. c. 70., so far as it relates to essoign and general return days. By the 2d section it is enacted, that all writs now usually returnable on general return days "may be made returnable, on the third day exclusive, before the commencement of each term, or on any day, not being *Sunday, between that day and the third day exclusive* before the last day of the term; and the day for appearance shall" "be the third day after such return, exclusive of the day of the return; or in case such third day shall fall on a *Sunday*, then on the fourth day after such return, exclusive of such day of return." With regard to process by original, therefore, the days on which it may be made returnable are no longer confined to four or five, but may be made returnable on any day, not being *Sunday*, on or between the third day before term, and the third day before the end of term. By a strict construction, the repealed words of the 11 G. 4. and 1 W. 4. c. 70. § 6. which refer to the substitution of *Monday* for *Sunday* in certain cases, would only apply to the essoign and general return days. But Mr. Tidd† thought, that, in accordance with the practice in *Hilary* and *Michaelmas* terms, when the day of the month appointed for them to begin or end fell on a *Sunday*, and from the general import of the words, that the substitution of *Monday* for *Sunday* would apply to the beginning and ending of *Easter* and *Trinity* terms. This opinion prevailed in several of the offices, and the almanacs were formed according to it. But the new act having repealed the provision of the former act, as to the substitution of *Monday* for *Sunday*, and made none in its stead, nothing remained as to the day of commencement of the term, when the day of its commencement should fall on a *Sunday*; and if, therefore, the day of the month fixed for its commencement should fall on a *Sunday*, that day must be considered as the first day of *term*, since the unrepealed part of the 6th section of the 11 G. 4. and 1 W. 4. c. 70., which fixes the day for the terms to begin, is the only provision on the subject. But a great portion of the profession acted on the construction put by Mr. Tidd on the words of the repealed act with respect to last *Trinity* term, and consequently miscalculated the essoign day. The effect of this was various irregularities in the service of declarations in ejectment, and essoign declarations. By the unrepealed part of the 6th section of Sir *James Scarlett*'s act,

* For the statute, see Monthly Record for April.

† Supplement to Practice, p. 206. n. (b).

Trinity term began on the 22d of May. That day fell on a *Sunday*. The essoign day was consequently the 19th; but, acting on Mr. Tidd's construction of the repealed clause, *Monday* the 23d was treated as the first day of the term, and the 20th as the essoign day. In consequence of the irregularities produced by this course, the Judges met, and determined that the 22d of May was to be considered as the first day of term, although it fell on a *Sunday*. By the new rules this construction will be of no importance as to declarations in ejectment, for, by the 11th rule, "declarations in ejectment may be served before the first day of any term; and thereupon the plaintiff shall be entitled to judgment against the casual ejector in like manner as upon declarations served before the essoign or first general return day."* It will, however, be of importance in the case of essoign declarations. This construction will of course apply to *Easter* term as well as *Trinity* term.

Since it has now been decided that *Sunday* is the first day in full term, it would seem, that process usually returnable on a day certain in full term, might be made returnable on that day.

The words of the 2d section of the present act, directing that all writs heretofore returnable on general return days may be made returnable on the third day exclusive before the commencement of each term, or on any day, not being *Sunday*, *between that day and the third day exclusive before* the last day of the term, leave it doubtful whether writs may be made returnable *on* the third day before the end of the term. If not, then the last day of the term will not, as heretofore, be an appearance day. But it is conceived, that, as the words are somewhat doubtful, the construction put upon them by the Courts would be, that process could be made returnable *on* the third day. This more particularly, as the present practice would by that means be preserved and upheld.

The enactments contained in this section will only affect process by original. It will, however, extend to attachments against the sheriff for not returning the writ, or not bringing in the body, which, in the King's Bench, and, it should seem, in the Exchequer also, must be made returnable on a general return day; and in the King's Bench, even though the process in the cause is returnable upon a day certain.†

The 11 Geo. 4. and 1 Wm. 4. c. 70. § 6. after fixing the days on which the terms were to commence, the section then had this proviso: "that if the whole, or any number of the days intervening between the *Thursday* before and the *Wednesday* next after *Easter* day shall fall within *Easter* term, there shall be no sittings in banc on any of such intervening days; but the term shall in such case be prolonged and continue for such number of days of business as shall be equal to the number of the intervening days before-mentioned, exclusive of *Easter* day; and the commencement of the ensuing *Trinity* term shall in such case be postponed, and its continuance prolonged, for an equal number of days of business." This provision had the effect of leaving these two terms moveable to the extent of four days.‡ Mr. Tidd§, in speaking of this provision, says, that "it may be doubted, whether, if the whole, or any number of the days intervening between the *Thursday* before and the *Wednesday* next after *Easter* day fall within *Easter* Term, these intervening days are to be considered as part of the term; or, as there are no sittings in banc on any of such intervening days, whether a writ can be made returnable thereon. These points, it is conceived, can only be settled by a declaratory act." But such a declaratory act would scarcely be necessary, as the legislature had really declared in that act, those intervening days were not to be regarded as part of the term, as term was to be prolonged a proportionate number of days. Section 3. of the present act directs, "that in case any of the days between the *Thursday* before and the *Wednesday* next after *Easter* shall fall within *Easter* term, then such days shall be deemed and taken to be a part of such term, although there shall be no sittings in banc on any of such intervening days." The terms are now, therefore, fixed. With respect to the words of this section, considerable doubt may arise, since these intermediate days are to be considered as part of the term, although there shall be no sittings in banc on them. If they are a part of the term, then, it is conceived, an original might be made returnable on any one of them, as that might be made returnable even on a *Sunday*;‖ process by bill could not, as it is void if made returnable on a *dies non*.¶ By 1 Wm. 4. c. 7.

* See Monthly Record for June, and 2 L. O. 77.

† See *Rex* v. *Wilkins*, 1 Strange, 624. Tidd's Prac. Forms, c. 13. s. 16. p. 114. ed. 9. 2 Dowling's Stat. 9.

‡ Dowling's Statutes, 372.

§ Supplement, 206. n. (b).

‖ 1 Tid. Prac. 106. ed. 9.

¶ *Kenworthy* v. *Peppiatt*, 4 B. & Ald. 288.

§ 1., it is presumed that a writ of enquiry might be made returnable on any of those intervening days. For, by section 1. of that act, such a writ may be made returnable "on any day certain, in term or vacation." Being returnable in vacation, it is returnable on *dies non juridici;* and the intervening days being *dies non juridici*, no reason appears for distinguishing them from those occurring in vacation. And, besides, they are to "be deemed and taken to be a part of the term." It would be safer not to act upon these constructions until some decision on the subject has been pronounced by the Courts. It is easy to avoid making a writ returnable on any of those days. In accordance with the present practice, they would be reckoned in the running out of rules for judgment.

The object of the remaining sections is merely to amend and supply some of the details of Sir *James Scarlett's* act, so far as it related to the abolition of the Welsh Judicature.

REVIVAL OF REVELS IN LINCOLN'S INN HALL.

To the Editor of the Legal Observer.

SIR,

I HAVE just arrived in town from my *short* vacation trip (for reform has even curtailed that luxury of its fair proportions), and am delighted to find your publications have accumulated on my table in my absence. Every word that you publish, wrapper and all, do I attentively "peruse, settle, and approve." Nothing legal seems to escape you; and I am as wise and well acquainted with all that has passed, as if I had breathed the air of Lincoln's Inn for the last six weeks. I know your modesty; but indulge me by printing this slight tribute to your talents and activity. As you seem determined to give lawyers all that can be useful or amusing to them, I am induced to send you a little piece of intelligence which may entertain your readers at the close of their holidays, and send them to their labours again with good humour.*

You have heard and written, I think, about the ancient revels in the Halls of the Inns of Court. What think you of their revival? Nothing less, I assure you, is intended; and the first of these Societies is determined to set the fashion. The Hall of Lincoln's Inn is once more, I am assured, to become the scene of masque and dance; and as the time is approaching for pantomime, the sports are to commence with one. It is still a great secret; but there have been several rehearsals already, and the company is daily becoming larger. I can only give you a sketch of some parts of it, which I have procured with great difficulty, and which you must therefore value accordingly.

The pantomime has of course a dash of jurisprudence in it — a little legal current trickling through it; and the actors are all to be lawyers, many of them the most eminent of the day. I can, however, give you no names; the parts are, indeed, not finally cast, and much confusion in fact prevails. No one knows what next to do, or what will be finally their own; and there has been great squabbling, as is usual, about dresses and characters. At one of the rehearsals, I heard a learned equity Judge anxiously asking what he was to do; and a young man, just fresh from the Opera, gravely declaring that he was a Master in Chancery. But let me begin at once with my sketch.

The pantomime, then, is called — in compliment, doubtless, to the highest Judge in the land — HARLEQUIN CHANCELLOR; or, *Tricks and Changes.* Its opening scene represents a desolate-looking space of ground, which, on observing it closely, is discovered to be the site of Westminster Hall; but greatly altered and disfigured. One half of the Hall is completely pulled down; and the other totters, and looks as if it would fall every moment. The Courts of Equity are in a rapid state of decomposition; the Vice-Chancellor's, indeed, cannot be discerned at all; and an attempt seems to have been made to join all the Chancery Courts into one, but has evidently been found unsuccessful, and abandoned in despair. This, indeed, is the appearance of the whole scene; a thousand alterations seem to have been begun, and then discontinued. In one corner of the scene, a body of seventy, stout, active, workmen seem to have been turned off; and a party of raw-looking labourers appear to be assuming their places. On the opposite side, a vast crowd of persons are bawling to be heard aloud, and are tearing into pieces all the written papers they can find. A gigantic

Reubell v. *Preston*, 5 East, 291. Inman v. *Hulsh*, 2 N. R. 133. *Walker* v. *Hawkey*, 1 Marsh. 599. 1 Tid. Prac. 161. ed. 9.

* We have pleasure in inserting our correspondent's letter. Of course, however, its insertion is no evidence of our assent to its contents; *desipere in loco*, however, has always been one of our rules. — ED. L. O.

figure stalks from time to time through the scene, with a dæmon aspect, bearing a banner, on which the word CHANGE is written in letters of fire, in one hand, and a flaming torch in the other. It seems to view the slow progress of those employed in pulling down the Hall with displeasure; and at last, apparently from having nothing to do, sets fire to Westminster Abbey.

This is the first scene, which is quite a master-piece in its way. All appears involved in confusion, but the foot-lights are gradually raised, the crowd of figures recede, and Harlequin Chancellor, the hero of the piece, appears in his first dress, being that of a magician. He approaches an altar raised in the middle of the stage, and utters an invocation to the dæmon with the torch.

He declares that he has ever been its constant worshipper, that his whole life has been devoted to its service: he points to the ruins of the Hall, and the whole of the scene around him, as evidences of this devotion; and swears, that if the dæmon will only give him strength and grant success to his undertakings, his exertions in the dæmon's cause will be unceasing; that he will pull down the remaining half of the Hall, clear away the Abbey entirely, and leave no stone standing on another of all the landmarks of the country. The dæmon thunders his satisfaction at this invocation — promises to assist him in all his plans — bids him persevere in his efforts in its service, — and, flapping its dark wings, flies off as the scene changes; first presenting to Harlequin Chancellor the usual magic wand, which, however, in this pantomime resembles a mace.

The next scene represents an extensive Hall or place of public meeting. The walls are hung with ancient tapestry; on one end of the room appears a throne, and down the sides and in the middle of the Hall are seen long rows of red-covered benches, which are occupied by a number of dignified looking personages with coronets on their heads. This scene illustrates the second title of the piece, or *Tricks and Changes*. Harlequin Chancellor here appears in his second dress, his mask on his face, and his mace in his hand, sitting at the top of the Hall. The first trick which he plays off is to let no one speak but himself, for if any one says so much as a single "Hear," or other mark of attention, down he knocks him with his mace in a very diverting manner; nay, he appears in this scene to be so irritable, that one of the characters on the benches wearing long spurs having stated that Harlequin wore a mask, he gets up in a fury, and changes the other into the character of Bottom in the twinkling of an eye. Harlequin Chancellor next proceeds to fill his own pockets; which he renders highly amusing, by loudly declaring that he is in fact emptying them. He then goes through a great variety of curious and skilful evolutions; such as dancing on the slack-wire, eating hasty-puddings, burning his fingers, playing at pitch and toss, swallowing a sword, and letting off squibs, and then saying it was not his doing. He ends this scene by throwing a cracker among a parcel of old women with long sleeves sitting on one side of the Hall, and then tries to conjure the coronets off the heads of the other persons on the benches; in which, however, he does not succeed.

In the next scene he is discovered sitting in a Court of justice: he is here blindfolded; but, as usual, declares that he sees perfectly well. He is playing at a game of lottery; and throwing about blanks and prizes to a large crowd about him, who are scrambling for what he casts down. He makes every one die with laughing in this scene, by gravely declaring that he is an equity Judge, and that he can pull out ten blanks in an hour; and that if he be only allowed to go on, no person need despair of getting a blank if they will only come to his wheel; and that every other lottery man now had better shut up his shop. He next performs his great trick of making an old man young, and a young man old. This is a happy specimen of the abilities of this clever actor. The old man seems to have been nearly bed-ridden, and to be unable to walk a step; Harlequin Chancellor, however, waves his wand, and he throws away his crutches, and becomes young in a moment. So, also, no sooner does the youth hear the word of command than his hair turns grey, and he immediately appears imbecile and incompetent to the very life. In the rehearsal that I saw, Harlequin here set fire to a train which he had not intended should explode so soon; he was blown up, and the curtain fell.

† * †

SWEARING AFFIDAVITS IN LONDON.

To the Editor of the Legal Observer.

SIR,

As you are ever ready to point out those things which require amendment, and to give publicity to suggestions for their improvement, I make no apology for directing your attention to a

serious inconvenience which has been, and is, often severely felt by professional men, as well as their clients. It is this: — The offices at which affidavits must be made for the arrest of individuals, are situated in the Temple, and they are only open at certain hours in the day. The morning hours are those in which men of business are most occupied: the evening, those when they have left for their country residences. Now consider what an extent of business is done at the East end of the town, and how great the distance is from various parts to the offices, and, consequently, how much time is occupied by the mere journey. Few men can afford to waste so much time; and, therefore, except under peculiar circumstances, they waive legal proceedings, and frequently lose their money. I have more than once sustained injury myself on this account; it is, therefore, no fancied evil which I represent. But the inconvenience might soon be remedied by the establishment of a Branch Office, or the appointment of commissioners. The officers themselves would find the change very beneficial, and it would be extremely grateful to the profession and the public. The same observations will apply to the other parts of town.

F. W. G.

*** The serious inconvenience pointed out by our correspondent has attracted the attention of the Common Law Commissioners, who have proposed a remedy. *Vide* Appendix to Legal Observer, p. xxiii.

REVIEW.

Rotuli de Dominabus et Pueris et Puellis de Donatione Regis, in XII Comitatibus: Lincolnscir, Norhamtonsire, Bedefordsire, Bukinghamsire, Roteland, Huntedonsire, Norffolk, Sudfolk, Hertfordesire, Essex, Cantebrigesire, Midelsex; de itinere Hugonis de Morewich, Radulfi Murdac, Willelmi Vavassur, et Magistri Thome de Hesseburn. Anno 31 *Regis Henrici II.* 1185. *Curante Stacey Grimaldi, Arm. S. A. S. Londini: Pickering,* 1830.

We had the pleasure to notice a former work — the *Origines Genealogicæ* * — of the learned writer, who has again favoured the profession with the further result of his laudable researches. The present publication is designed as an addition to its predecessor; and in laying before our readers an account of its contents we cannot do better than largely borrow from the able Preface to the present Work, taking, however, the liberty to transpose the order of the matter to suit our view of the subject.

This Record, as Mr. Grimaldi observes, has much claim to the notice of the historical antiquary, and matters of very great interest receive elucidation from it.

There are but four national records of earlier date, namely, 1. The Domesday Book; 2. The Chartæ Antiquæ, in the Tower of London, — both of the time of William I.; 3. The Pipe Rolls, commencing in the reign of Stephen; and, 4. The Black Book of the Exchequer, compiled in the reign of Henry II. Of these, the first was printed in the year 1763, at the expense of the nation; of the second, a Calendar was printed in 1774, at the expense of Sir Joseph Ayloffe, Bart. The Records (called the Pipe Rolls) have not yet been published, though much desired; and the fourth record was published in 1729, at the private expense of Thomas Hearne, the antiquary.

The Latin in which it is written has many words or terms, which are of too rare occurrence to be found in the ordinary glossaries. The genealogical information in it is very great, and of additional value as relating to a period thirty-three years prior to the earliest inquisition *post mortem*.

The existence of the original Rolls has not hitherto been discovered. In the manuscript of Sir Simonds Dewes (from which Mr. Grimaldi's transcript has been made) it is in several places stated that the originals were, in 1639, much destroyed by time; and the twelfth Roll, having been separated from the others, was not met with until 1643. Sir William Dugdale quoted them in his Baronage published in 1675; and no person appears to have noticed them from that time until the year 1829, when their loss was pointed out in the Preface to Mr. Grimaldi's "Origines Genealogicæ," and these pages are now printed, in order that the contents of so interesting a record may no longer be subject to the casualty of total oblivion, by remaining confined to a solitary transcript, after the original in the *safe* archives of the Remembrancer of his Majesty's Exchequer has perished. The Rolls which have thus been printed, were transcribed by permission of the trustees of the British Museum, from a copy certified by Sir Simonds Dewes and Roger Dodsworth to have been compared by them with the originals, on Thursday, the 3d of May, 1643, preserved in the volume in the Harleian Collection, No. 624.

They relate to the twelve counties mentioned in the title-page, and contain abstracts of the inquisition taken in the year 1185, (31 Hen. 2.), for the purpose of ascertaining the wardships, reliefs, and

* Vol i. p. 588.

other profits due to the King from widows and orphans of his tenants *in capite*, minutely describing their ages and heirship, their lands, the value of them, the beasts upon them, and the additional quantity necessary to complete the stock.

The date of the record is ascertained from the Pipe Roll of the 31 Hen. 2. where it appears that the Justices Itinerant, by whom these inquisitions were collected, were such in that year; and it appears, from various entries, that the evidence was obtained by the sheriff or escheator before jurors, and that the inquisitions were presented to the justices in their *itere*.

"The tenures of various lands (unnoticed in Blount) appear in this Record.

"Many titles of honour are named; no less than fifteen Earls are particularised. Several manorial honours, as well as manors, are described, and mills are not unfrequently mentioned, evidence of the existence of which at that period is important, since it relieves them from payment of tithes.

"Females are generally stated to have married at the ages of eighteen or nineteen years.

"The greater part of the estates were under stocked; but the lands in the possession of the monks are more than once represented to have been overburdened, and the tenants grievously rackrented: John, the clerk, is recorded to have been guilty of fraud. The value of the land and of the stock is often so clearly set out, that it affords a basis for more correct conclusions upon the value of money at that remote period, than have probably been hitherto arrived at.

"The rental of the majority of the estates of the tenants *in capite* was about 20*l.* per annum; some were as low as a very few pounds, and one was as high as 42*l.*: from all of which it seems probable that the historical statement of William the Conqueror having a yearly income of 400,000*l.* is erroneous.

"The specification of the several beasts affords information of the domestic policy of our early ancestors: the total stock of 47 of these great tenants, taken promiscuously, was as follows: — 86 ploughs, 8198 sheep, 199 hogs, 109 oxen, 202 cows, 32 bulls, 15 boars, 82 sows, and 17 beasts of burden. This aggregate would give 174 sheep to each tenant. Horses are so rarely mentioned, that it is probable they were omitted intentionally.

"The house belonging to the widow of Robert de St. Paul, and given to her in dowry, was worth 8*l.* per annum."

We concur with Mr. Grimaldi, that it would scarcely be just to conclude this account of a record which is only now known from the gratuitous labours of an individual, without acknowledging how deeply this country is indebted to the antiquaries of former days for their indefatigable exertions, and how much we owe to the patriotism of Harley, Cotton, and others, who collected and preserved the fruits of such labours.

SUPERIOR COURTS.

VICE-CHANCELLOR'S COURT.

ANNUITY. — BANKRUPT.

If a person has charged his expectant property with an annuity, and afterwards becomes bankrupt, and obtains his certificate, and his expectant property afterwards devolves upon him, it will be liable to the payment of the annuity.

In this case a bill was filed to charge certain property, to which the defendant was entitled under the will of his wife, with the payment of an annuity, which the defendant had some years previously granted to the plaintiff. The deed securing the annuity contained a covenant, whereby the plaintiff charged whatever property should come to him under his wife's will, with the payment of the annuity, if his other means failed. The defendant subsequently became a bankrupt, having paid only one half yearly payment of the annuity. He afterwards obtained his certificate; and some time subsequently his wife died, leaving him by her will the property which the bill was now intended to fix with the annuity.

Mr. *Pepys* and Mr. *Parker* for the plaintiff, said that the defendant was only released by his certificate from all personal liability, and with this the bill was not intended to interfere.

Mr. *Knight* and Mr. *Wakefield* contended that, according to the whole policy of the bankrupt laws, the property could not be charged. Annuities were placed upon the same footing as simple contract debts, and were proveable under the commission; and as the annuity was therefore gone in law, the property acquired subsequently to the certificate could not be charged.

The *Vice Chancellor* was of opinion that the defendant had a right to charge his property in expectancy. He had here charged his expectancy in favour of the plaintiff; and although at law the plaintiff could not maintain an action of covenant, yet a Court of equity would compel her to make good this charge on his property. The prayer of the bill, therefore, must be granted. — *Lyde* v. *Myer*. V. C. July 11. 1831.

COURT OF KING'S BENCH.

PROMISSORY NOTE. — INLAND BILL OF EXCHANGE. — FELONY. 3 & 4 ANN. c. 9. § 1.

A promissory note is within the 3 & 4 *Ann. c.* 9. § 1., *and therefore negotiable in foreign countries.*

Trover for a Bank of *England* note of 500*l.* stolen in this country, taken to *France*, and there transferred to a correspondent of the plaintiff, and remitted to him. The question for the opinion of the Court was, whether a

Bank of *England* note, which is a promissory note payable to bearer, is negotiable in foreign countries, so as to entitle the plaintiff to recover it from the Bank of *England*, who withheld the note at the request of the person from whom it had been stolen.

Platt, for the plaintiff, was stopped by the Court.

Follett contrà. Before the statute of *Anne*, such a note as this was not negotiable by the custom of merchants, and therefore was not transferable. It might have been transferred from the maker of the promissory note to the person in whose favour it was drawn, but could not have been used as a negotiable security. The preamble of the statute of Queen *Anne*, which makes these notes negotiable, shows that they were not so before. The words of the preamble are, "Whereas it hath been held, that notes in writing signed by the party who makes the same, whereby such party promises to pay unto any other person or his order, any sum of money therein mentioned, are not assignable or indorsable over within the custom of merchants against the person who first made and signed the same; and that any person to whom such note should be assigned, indorsed, or made payable, could not, within the said custom of merchants, maintain any action upon such note against the person who first drew and signed the same." Therefore, without going back to the earlier authorities, which proved beyond all question, that these promissory notes were not before the statute transferable from hand to hand, I shall at once assume the law to be so. The indorsee, therefore, of such a note has no right to sue upon it, except by the express words of the statute of *Anne*. This statute puts these notes on the same footing as inland bills of exchange in this country. But, when we came to apply the words of the statute to notes negotiated in a foreign country, the question is, whether this act of parliament authorises the transfer of these notes there. I say that the statute has put promissory notes payable in this country on the same footing as inland bills of exchange in this country only. The question then is, what would have been the effect of a transfer of a bill stolen in this country, and then delivered in a foreign one, before the statute of Queen *Anne* passed. Now, as there was nothing in the law of this country, and assuming there was nothing in the law of France, to render them negotiable, what would have been the situation of the promissory note. It is clear that no right to sue would have been vested in the person to whom it was so transferred. Then, as the statute applies only to *England*, and all notes indorsed or transferred in *England*, it cannot extend to *France*. Therefore, notes transferred or indorsed in *France* do not come within the statute.

Parke J. You say that the note is not negotiable in *France*; however, it got there. Then the last payee must be at the loss of it; for the Bank of *England* cannot pay any one with safety, except the original payee.

Follett. I apprehend my argument does not go that length. In a case where no felony had been committed, there would be no one to object to the payment, and no reason for disputing it.

Parke J. Yes; but if these notes are not negotiable by the law of *England* in foreign countries, their negotiable quality ceases when they get into foreign countries. Consequently, the Bank of *England* will not be bound to pay them.

Follett. I still contend that, the statute of *Anne* applying only to notes transferred in this country, this note was not negotiable in *France*.

Lord *Tenterden* C. J. I do not understand it to be contended, that inland bills of exchange were not negotiable in foreign countries by the custom of merchants before the statute of Anne. Then, what is the effect of the statute of Anne? The words are, "that every such note shall be assignable or indorsable over, in the same manner as inland bills of exchange are or may be, according to the custom of merchants." The object of the statute therefore was to make promissory notes negotiable like inland bills of exchange. If so, then a promissory note is negotiable in foreign countries. It appears to me, that a promissory note payable to bearer is transferable abroad in the same manner as an inland bill of exchange previous to the statute of *Anne*.

Littledale J. concurred.

Parke J. This was an action of *trover* brought for a stolen bank of *England* note, which had been received by the plaintiff from his correspondent in *France*. The bank of *England* stopped the note at the request of the person, from whom, it had been stolen. The question for the consideration of the court is, who had the legal property in the note at the time it was stopped. Before the statute of *Anne*, the plaintiff would have had a right to sue on an inland bill of exchange so transferred into his possession, unless it could be shown that he did not obtain it *bonâ fide*, and for a valuable consideration. The statute of *Anne* entitles him to sue on a promissory note in the same manner as he could on an inland bill of exchange before the statute was passed. The plaintiff being here the bearer of this note for a valuable consideration, it appears immaterial to consider through what countries it passed. If the argument of Mr. *Follett* were to prevail, notes of this kind could only be circulated in *England*. The only person, to whom, the bank of *England* could pay with safety would be the person who had taken it in *England*.

Patteson J. The only question is, whether a promissory note made here in *England* can be transferred in a foreign country. Now, there is no limitation in the statute of *Anne* as to the country, in which, the note may be transferred. The statute says that the person "to whom such sum of money is or shall be by such note made payable, shall and may maintain an action for the same, in such manner as he, she, or they might do upon any inland bill of exchange made or drawn according to the custom of merchants." According to Mr. *Follett*'s doctrine, if a bill drawn in *England* were given to A., transferred by him to B., from B. to C., from C. to D.; although the beneficial interest in the bill would be in D., he could not bring his action in his own

name, but must bring it in the name of B., he being the original payee.

Judgment for the plaintiff. *De la Chaumette* v. *the Bank of England*, T. T. June, 1831.

NOTICE OF TRIAL, 11 G. 4. & 1 W. 4. c. 70. § 7.

The time for giving notice of trial in causes, where the defendant lives more than forty miles from London, *and the venue is in* London *or* Middlesex, *is not altered by the* 11 *G.* 4. *&* 1 *W.* 4. c. 70. § 7.

Wightman showed cause against a rule obtained by *Humphreys* to set aside notice of trial, on the ground of his not complying with the rule of the 51 Geo. 3.* By the rule of the 4th of *Anne*†, it is directed, that "if the venue be laid in *London* or *Middlesex*, and the defendant live within forty computed miles of *London*, there must be eight days' notice of trial, exclusive of the day it is given, but inclusive of that on which the trial is to be had; and if the defendant live more than forty computed miles from *London*, then fourteen days' notice must be given." And by the rule of the 51 G. 3. it is directed, that "in every notice of trial to be given for the sittings after any term to be holden at the *Guildhall* of the city of *London*, it shall be specified whether the cause is intended to be tried at the first day of such sittings, or at the adjournment day; and that in every case in which such notice shall specify that the cause is to be tried at the adjournment-day, it shall be sufficient to give such notice eight days before the first day of the sittings after term, if the defendant or defendants reside above forty miles from the said city of *London*, and four days before the said first day, if the defendant or defendants reside within that distance." In the present case, the defendant resided more than forty miles from *London*. Notice of trial at *Guildhall* for the adjournment-day was given eight days before the first day of the sittings, in strict conformity with the rule. Before the passing of the 11 G. 4. & 1 W. 4. c. 70. § 7., when the trial was to take place at the adjournment-day, as that was six days after the first day of the sittings, the defendant had in fact fourteen days' notice of trial, as well as in those cases where the notice was for the first sittings after term. But the above statute having in its 7th section restricted the sittings after Easter Term to six days, and that period was divided equally between *London* and *Middlesex*, the defendant had in such cases only eleven days' notice of trial now. That however was merely the incidental operation of the statute upon the rule, and the plaintiff having complied with the rule, was not to be injured by the incidental effect of the statute.

Humphreys in support of the rule, contended that it was the intention of the Courts the defendant should always have fourteen days' notice of trial when he resided more than forty miles from town. The rule of the 51 G. 3. was not intended to repeal but to enforce that of *Anne*. The notice of trial given by the plaintiff in this case frustrated the intention of the rule, and therefore must be set aside.

Patteson J. The plaintiff has followed the rule laid down for his guidance. He is therefore right as the practice now exists. The rule must be discharged, with costs. I shall, however, speak to the other Judges, in order that some rule on the subject may be made, to meet the operation of the act of parliament.

Rule discharged, with costs.—*Gilson* v. *Sharpe*, T. T. June 9. 1831.

His Lordship took no further notice of the subject during the term.

CERTIORARI.—POOR RATE.

The Court will not grant a certiorari *to remove a warrant of distress to levy poor rates.*

Erle moved for a rule *nisi* for a *certiorari* to remove a warrant of distress to levy poor rates, and any adjudication or order, if any, on which it was founded. He made this application on the part of Mr. *Taunton*, a gentleman residing in *Surrey*, whose goods had been taken for arrears of poor rates. The ground of his complaint was, that the warrant had been issued against him without his ever having been summoned or heard against the issuing of it. It was clearly the duty of the justices to summon and hear the defendant before they issued such a warrant. That was the ground of complaint. But the difficulty was, whether the *certiorari* would extend to a warrant of distress. The rule of law was, that the *certiorari* would only remove judicial acts, and did not extend to ministerial acts, or writs of execution. But either there must be a judgment before the warrant issues, because the law requires the hearing and determining, which implies a judgment; or, if the statute of the 43 Eliz. c. 2. § 4., which authorises the issuing of the warrant of distress upon the application of the overseers, authorises it without a separate adjudication or order, then the warrant of distress must be taken to be both a judgment and a writ of execution. The rule of law was, that the *certiorari* should issue, in order to remedy any grievance arising from the judgment of inferior jurisdictions, where no writ of error would lie. Although the party was entitled to appeal, that did not prevent a *certiorari* from issuing when the time for appealing had gone by (1 Salk. 147.). Although by an action of *trespass*, the complainant might have redress for his injury, yet till this adjudication was disposed of, it would be conclusive proof of all the facts stated therein, and therefore would prove that the complainant had been summoned, it being so stated in the warrant; so that the quashing of this warrant was a necessary preliminary to bring the action.

Taunton J. As there is no precedent for issuing a *certiorari*, in such a case it gives rise to a strong presumption that this remedy does not extend to it. The statute of Elizabeth authorises the issuing of the warrant, without any adjudication at all. It is the practice of justices to make no adjudication in such cases. The

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* See the 51 G. 3. K. B. 13 East, 595. 2 Tidd. Prac. 755. ed. 9.

† Ibid.

warrant is not different in any respect from ordinary warrants. It is not, therefore, conclusive proof of any of the facts recited in it. If it has issued without the fulfilment of any preliminary requisite, the party against whom it has issued may have a remedy on that account by an action of *trespass*.

Rule refused. — *Ex parte Taunton.* E. T. May 5. 1831.

SLANDER. — STET PROCESSUS.

In an action of slander, the bankruptcy of the defendant is no ground for a stet processus.

Saunders showed cause against a rule for judgment, as in case of a nonsuit. The cause of the plaintiff not proceeding to trial was the bankruptcy of the defendant. It was an action for slander.

Joshua Evans proposed that a *stet processus* should be entered, on the very ground stated by Mr. *Saunders* on showing cause.

Saunders submitted, that in this form of action the bankruptcy of the defendant was no ground for staying the proceedings. If the action were to recover a debt, the case would be different.

Patteson J. You are not bound to consent to a *stet processus*.

Rule discharged, on the plaintiff's giving a peremptory undertaking to try at the next assizes. — *Anonymous.* T. T. June 11. 1831.

LANDLORD AND TENANT. — SHERIFF'S DUTY. — 11 Geo. 2. c. 19.

In an action against a sheriff for not reserving a year's rent pursuant to the 11 *Geo.* 2. *c.* 19., *the plaintiff may recover, although the tenant has been released after the jury are sworn, in order to make him a competent witness for the plaintiff.*

The 11 *Geo.* 2. *c.* 19. *applies to lessees and under-tenants, as well as landlords and lessees.*

In an action against the sheriff for not reserving a year's rent pursuant to the 11 Geo. 2. c. 19. for the landlord, before he levied for the debt of another, it appeared that the plaintiff was the lessee of the premises in question, and had let two rooms to an under-tenant. On the trial of the cause, the under-tenant was called by the plaintiff, after receiving a general release from him when the jury had been sworn. The jury found for the plaintiff to the amount of the rent claimed.

E. Lawes Serjt., moved to reduce the verdict to nominal damages, on the ground that the under-tenant being released, and the plaintiff thereby having no longer any claim upon him for rent, the sheriff could not be liable. The case was the same, now that the tenant was released, as if he had paid the money into Court. In such a state of facts the plaintiff would certainly not be entitled to damages.

Tindal C. J. This is an action against the sheriff for a breach of duty, in not reserving for the landlord a year's rent upon an execution levied against his tenant. If the tenant had paid the rent subsequently to the action, the landlord could have been entitled to nominal damages only; and the question is, whether a release given to the tenant after the jury were sworn, is equivalent to the payment of rent. Let us look to the substance of the transaction. The misconduct of the defendant renders the release necessary, and the release does not prejudice him in any respect. The verdict ought, therefore, to stand.

E. Lawes Serjt., in arrest of judgment, contended, that the statute of *George* the Second did not apply to the case of a lessee and under-tenant. He cited *Hoskins* v. *Knight*, 1 Maul. & Selw. 245., to show that the construction of the statute ought not to be extended.

Tindal C. J. The plaintiff is entitled to one year's rent only of the whole house, although let out in separate rooms; so that there is no hardship on judgment creditors, and his position is in no way altered, because he can only have, against each separate execution, the rent of the tenant against whom it is levied. Though it appears on the record, that the taking here was only of part of a messuage, the jury was satisfied at the trial that it was a separate taking.

Rule refused. — *Thurgood* v. *Richardson and another.* E. T. April 16. 1831.

PLEADING. — DEMURRER. — ATTORNEY'S CERTIFICATE. — ESTOPPEL.

If an attorney plead his privilege to common process, the plaintiff should reply, that he has not "taken out his certificate" for twelve months, and not that he has not "practised" for that period.

The defendant, who is an attorney, was sued by common process. He pleaded his privilege to be sued as an attorney. The plaintiff replied that he had not practised for twelve months. The defendant demurred to the replication.

Hughes, in support of the demurrer, contended that the real question, which ought to have been raised, was, whether the defendant had taken out his certificate for the last twelve months. If he had taken it out, and had got no clients, that was no objection to his being sued as an attorney. The plaintiff, therefore, had estopped himself by his replication. For by merely denying that the plaintiff had practised for twelve months, he admitted that the defendant had taken out his certificate. The replication was therefore bad.

Espinasse supported the replication, and cited 1 Tidd, Prac. 82. ed. 9., in which the rule of *Michaelmas* term, 1654, in the King's Bench and Common Pleas, which is, "that such attorneys as have not been attending their employment in this Court by the space of one year last past, unless hindered by sickness, be not allowed their privilege of attorneys," was set forth. This rule was also cited in the case of *Prior* v. *Moore*, 2 Maul. & Sel. 605. He submitted, that by this rule the plaintiff had not estopped himself, because the replication was an answer to the plea; since, if it should appear that the defendant had absented himself from the Court for the space of a year, without the excuse of sickness, the plaintiff would recover.

Patteson J. It does not appear that that rule has ever been acted upon. The plaintiff

should have replied, that the defendant had not taken out his certificate for twelve months.

Judgment for the defendant.— *Spike* v. *Adams*. T. T. June 10. 1831.

PRACTICE. — IRREGULARITY. — AMENDMENT.

Process will not be set aside, even though by attachment of privilege, on the ground of an irregularity, which may be amended as of course.

A rule *nisi* to set aside an attachment of privilege and bail bond, on the ground of an irregularity in not having fifteen days between the *teste* and return of the process having been obtained,

Andrews Serjeant showed cause. The court had frequently amended such a defect as this, as a matter of course, and refused to set aside proceedings. *Davis, one &c. Ass. of the Sheriff* v. *Owen and Thomas*, 1 Bos. & Pul., 342. 1 Tidd. Prac., 153. *Walker* v. *Hawkey*, 5 Taun. 853.

Spankie Serjeant distinguished those cases from the present, as there the process had been common, and here it was by attachment of privilege.

The Court allowed the plaintiff to amend without costs, and at the same time stated that applications to set aside proceedings, on the ground of informalities, which were amendable as a matter of course, would be useless.

Rule discharged. *Popkins, gent. one, &c.* v. *Smith*. E. T. April 30. 1831.

SETTING OFF COSTS. — PRACTICE.

Where costs have been actually taxed in one cause, the Court will not allow those costs to be set off against the probable costs of the opposite party in another cause between the same parties.

An action of trespass and an action of ejectment between the same parties came on to be tried at one assize. The plaintiff was nonsuited in the former action, and obtained a verdict in the latter. A rule *nisi* for a new trial in the latter case was obtained by the defendant. The costs in the former action were taxed.

Andrews Serjeant applied, on the part of the plaintiff, to be allowed to set off the defendant's taxed costs in the former action, against the plaintiff's probable costs in the latter. A rule *nisi* was granted, and

Bompas Serjeant showed cause. He submitted, that there was no authority for this application, and no special circumstance stated, such as the defendant's insolvency, or other matter, which ought to induce the Court to interfere for the first time.

Andrews Serjeant being unable to produce an authority showing that the Court had ever interfered in a similar instance, the rule was discharged.

Rule discharged. — *Mastermann* v. *Malin*. E. T. April 23. 1831.

STAMP ON LEASE.

Where a lease reserved 370l. a year for a house and land, and by a separate reservation 50l. a year for fixtures and furniture, a three pound stamp is not sufficient, within the 55 G. 3. c. 184.

In an action of covenant, on a lease of a house and land, a rent of 370*l. per annum* was reserved. There was a distinct reservation of 50*l.* a year for furniture and fixtures. The lease had a 3*l.* stamp on it. A verdict was found for the plaintiff, with leave to move to enter a nonsuit. A rule *nisi* having been obtained on the ground that the stamp should have been a 4*l.* one instead of a 3*l.* one,

Taddy and *Andrews* Serjeants showed cause. If the rent for the furniture and fixtures had been reserved at different times, and by different instruments, a higher amount of stamp on the different instruments or reservations might have been necessary. Here, however, the proper stamp, according to the reservation on the house and land, had been made. The reservation of rent for the fixtures and furniture was merely accessory, and therefore did not require a further stamp.

Tindal C. J. The 50*l.* rent is either accessory or distinct. If it is accessory, it ought to have been calculated with the principal sum, and then the stamp would have been according to the statute. If distinct, it is within the description "lease of any other kind not otherwise charged; 1*l.* 15*s.*" It ought therefore in that case to have a separate stamp.

The other Judges concurred.* — *Coster* v. *Cowling*. E. T. May 6. 1831.

SMALL DEBTORS' ACT. — LORDS' ACT.

The Court will discharge a debtor, who has lain in prison for a debt under 20l. more than a year, under the 48 G. 3. c. 123. § 1., although he has been brought up under the compulsory clauses of the Lords' Act, and has refused to deliver in his schedule.

B. Andrews applied for the discharge of a debtor, under the 48 G. 3. c. 123. § 1., who had lain in prison above twelve months, for a debt not exceeding 20*l.* The debt amounted to 10*l.* damages, in an action against the prisoner. The usual notice had been given, and therefore he was entitled to his discharge as a matter of course.†

Kelly showed cause. The defendant had been brought up under the compulsory clauses of the *Lords' Act*. He had demanded his sixty days to deliver in his schedule, but did not deliver it. He was therefore liable to transportation for seven years. Until he has complied with those pro-

* See also *Boase* v. *Jackson*, 3 Brod. & Bing. 185.

† It is to be observed, that the practice of the King's Bench and Common Pleas differs, as to whether the rule for the order of discharge under the above act shall be absolutely *nisi* in the first instance. In the King's Bench it is absolute in the first instance, after giving due notice. *Davies* v. *Rogers*, 4 Dow. & R. 361. 2 Bar. & Cres. 804. S. C. In the Common Pleas, it is only a rule *nisi* in the first instance. *Ex parte Neilson*, 7 Taunt. 7. *Magnay* v. *Gilkes*, 7 Taunt. 467.

visions of the *Lords' Act* under which he was brought up, he cannot be entitled to his discharge under this act.

B. Andrews, in support of the rule, cited *Ex parte Cusac*, 1 Chit. Stat. 589.; in which it was holden in the Court of King's Bench, that this clause is compulsory on the Court, and that the Court has no power to compel the defendant to make a schedule, or assign his property, he having duly applied under the provisions of this act, although the creditor on the same day duly brought up the defendant under the compulsory clause of the *Lords' Act*. The Court said, that where the original debt was under 20*l.*, and the defendant has been in prison more than a year, he is absolutely entitled to his discharge, without qualification, except under the act, against the estate. He also cited *Langdon* v. *Rossiter*, 13 Price, 186. *Wood* v. *Kelmerdine*, 2 Y. & Jer. 10., in which the same point arose. The defendant's whole property is still liable, and he may be transported. But he is entitled to his discharge now.

Patteson J. made the rule absolute for an order for his discharge.

Rule absolute. — *Ex parte White*. T. T. May 24. 1831.

ARREST WITHOUT PROBABLE CAUSE. — JURISDICTION OF THE COURT OVER ITS ATTORNEYS.

Where a defendant has been arrested by an attorney for his bill of costs, without reasonable and probable cause, the Court will oblige the attorney to pay the costs of the action, and discharge the defendant out of custody; semble, *whether the circumstances of the case bring it within the* 43 *G.* 3. c. 46. § 3. *or not.*

Kelly showed cause why the defendant should not be discharged out of custody, and why he should not pay the defendant the costs of the action under the 43 G. 3. c. 46. § 3., and the costs of taxation of the plaintiff's bill, and the costs of the present application. The circumstances of the case are these: — It appears that in the year 1829 an action was brought by one *Sarson*, against the defendant in the present case, *Spinks*. *Matthews*, the plaintiff in the present case, was employed by *Spinks* to defend the action. It proceeded to a certain length, and, after several applications to settle the amount, the plaintiff delivered a signed bill, according to the statute, for the defence of this action. He allowed more than a month to elapse, and then arrested *Spinks*. After that, the defendant met with an attorney, and being told that some of plaintiff's charges were greater than they ought to be, a summons to tax was taken out, and an order made in the usual way, that the bill of costs, for which the action was brought, should be referred to the master to be taxed, and all other proceedings be stayed until a week after the master had given out his *allocatur*, and the plaintiff be at liberty to sign judgment and sue out execution for such sum as the master should find to be due. The bill of costs, which was 20*l.* 2*s.* 6*d.*, was taxed down to 16*l.* Then the defendant comes to this Court with the application contained in his rule. As to the costs of taxation being allowed to the defendant, more than one-sixth having been taxed off the bill, there is this distinction: where, on the delivery of the bill, and before action brought, more than a sixth is taxed off, then the attorney is to pay the costs of taxation; but if afterwards, then he is entitled to the costs of taxation.

Barstow. I do not dispute that proposition, but it has nothing to do with this question.

Kelly. The charges themselves do not appear to be made without reasonable or probable cause. They were very properly taxed off, perhaps; but still there was nothing unreasonable in the attorney making them. If not, then the defendant is not entitled to his costs within the 43 G. 3. c. 46. § 3.

Barstow, in support of the rule. With respect to the costs of taxation, more than one sixth having been taken off by the master, I only make use of that circumstance, to show that the arrest was without reasonable and probable cause within the 43 G. 3. I contend that he had no probable cause for arresting the defendant for 20*l.* 2*s.* 6*d.* He ought not to have arrested when the amount of his bill only exceeded, by half-a-crown, the sum for which he could by law arrest. But he knew that he had no right to arrest at all. For there is a charge in his bill of seven shillings for making and copying his own bill of costs. He knew he had no right to make this charge against his own client, and therefore it is clear that he sat down to manufacture the bill in order that he might just wring it up to the amount at which he could arrest.

Patteson J. It does not therefore follow that he is entitled to be discharged out of custody.

Barstow. I submit that he is entitled to be discharged, as he has only been confined by an abuse of the process of the Court. The case stands as if the affidavit of debt were for 15*l.* The proceedings are still upon mesne process only.

Patteson J. The words of the statute 43 G. 3. are "that in all actions wherein the defendant or defendants shall be arrested, and held to special bail, and wherein the plaintiff or plaintiffs shall not recover the amount of the sum for which the defendant or defendants in such action shall have been so arrested and held to special bail, such defendant or defendants shall be entitled to costs of suit, to be taxed according to the custom of the Court in which such action shall have been brought; provided that it shall be made appear to the satisfaction of the court in which such action is brought, that the plaintiff or plaintiffs in such action had not any reasonable or probable cause for causing the defendant or defendants to be arrested and held to special bail in such amount as aforesaid." The statute does not say that the defendant shall be discharged out of custody if he has been arrested for a greater sum than was reasonably or probably due.

Barstow. In the case of *Robinson* v. *Elsam*, 5 Bar. & Ald. 661., it was holden that this was a case within the 43 G. 3. c. 46. § 3. There an attorney brought his action for his bill of costs, and held the defendant to bail in a larger sum than was afterwards found to be due on taxation, without having any reasonable or probable cause

for so doing. It was holden by the Court, that this was a case within the 43 G. 3. c. 46. § 5.; and also, that if not within the statute, still the Court, in the exercise of its jurisdiction over its own officers, would compel an attorney to pay costs under such circumstances. This case, I submit, is conclusive. But as to the costs of the action, and the discharge of the defendant out of custody, I do not rest my argument on the 43 G. 3., but on the common-law jurisdiction of the Court over its own officers and process.

Patteson J. I cannot but say that the arrest was without reasonable and probable cause. Then, on the authority of *Robinson* v. *Elsam*, the defendant appears entitled to the costs of the action. And if he has been arrested without reasonable and probable cause, he is wrongly in custody, and therefore he ought to be discharged out of it. The rule must therefore be made absolute.—Rule absolute. *Matthews* v. *Spinks*. T. T. June 4. 1851.

ENTERING THE ISSUE. — JUDGMENT OF NON PROS. — PRACTICE.

In a country cause, if issue be joined in Hilary term, and notice of trial given and countermanded, the plaintiff has only the Hilary vacation to enter the issue; and if he does not enter it during that period, nor within four days after the service of the rule to enter it, the defendant may sign judgment of non pros.

Saunders showed cause against a rule obtained by *Follett*, why the judgment of *non pros.*, and execution issued thereon, should not be set aside for irregularity. The ground on which the rule had been obtained was, that the action having been brought in the county of *Kent*, the plaintiff had till the continuance day of *Easter* term to enter the issue. Issue had been joined in *Hilary* term, and notice of trial given and countermanded. At the beginning of *Easter* term following, a four-day Master's rule was served on the plaintiff to enter the issue. It not being entered, the defendant signed judgment of *non pros.* and sued out execution. The first question for the consideration of the Court was, whether the rule given by the Master was proper; and secondly, if not proper, whether, after the plaintiff had acquiesced, and taken no step to set aside the rule, the irregularity was such as to induce the Court to set aside the judgment. It was said to be clear that the Court would compel its own officers to do all acts which in the progress of a cause it was their duty to perform, and this according to its own discretion; and in matters which are peculiarly within the Master's province, the act of the Master is the act of the Court. Now, in strict propriety, it is the duty of the plaintiff's attorney to enter the issue in the same term as that in which it is joined, and upon his neglect, the Court will, at the instance of the defendant, compel him to do so, and this by a rule which it is peculiarly within the Master's authority to give. Here the plaintiff was served with a rule given by the Master to enter the issue in four days, and that rule the plaintiff ought to have observed. If the Master were right, the judgment was regular; if wrong, the plaintiff should have moved, as he had opportunity, to set the rule aside. There was no irregularity with the defendant. If the Master was wrong, the defendant is not responsible; if right, then the plaintiff only is irregular, and for that irregularity the judgment is proper. But what is the objection to the proceedings? It is said, that the plaintiff had till the continuance day of *Easter* term to enter the issue. This statement depends upon a passage in Tidd's Practice — "The plaintiff being ruled to enter the issue, &c. &c.; *if in the country, before the continuance day of that term.*" — (Tidd. Prac. 727. ed. 9.) But upon what is this founded? Not upon any rule of Court, nor upon any decided case; but upon a mere unauthenticated note, subscribed to a rule of Court by some unknown annotator. And such being the authority, do the words bear the meaning assigned to them? The words are, "the continuance day of *that* term." It is said by the plaintiff that the words "*that term*" mean the term of which the rule is given; but it was submitted, that the words, taken in connection with the text, mean the term of which issue is joined. There is some ambiguity in Mr. Tidd's Practice, caused by the introduction of the practice of other Courts; but, rejecting extraneous matter, it would appear that the only term spoken of is the term in which issue was joined; and this is now clearly apparent from what is said in Sellon's Prac. 403., with which also Crompton agrees.

Patteson J. Such a construction as is contended for by the defendant's counsel would not be consistent with what is previously stated by Mr. Tidd, that the defendant ought not to give a rule to enter the issue in the same term in which it is joined, in a country cause.

Saunders. That appears to be so; but Mr. Tidd does not agree with Sellon or Crompton, from both which it is clear that in country causes, where notice of trial is given, the plaintiff may be ruled to enter the issue; and the words are to be construed with reference to the practice at the time when the note was made. Besides which, assuming the plaintiff's construction to be true, it will follow that the plaintiff could be compelled in no instance to enter the issue; for the continuance day alluded to is the essoign day, or the day preceding the essoign day, of the subsequent term; and it has been decided * that a judgment of *non pros.* cannot be regularly signed, unless there be a rule to enter it of the same term in which judgment is signed; therefore, as judgment could not be signed till after his default, and the default could not be till the subsequent term, when a new rule would be necessary, the entry of the issue would be put off from term to term *ad infinitum*.

Patteson J. This would seem to be the consequence, unless the plaintiff could be allowed to enter the issue as of a preceding term, between the essoign day and the first day in full term.

Saunders. But after all, it was said, that to reason upon the practice appeared to be a work of supererogation. The practice being a thing of arbitrary appointment, about which reason

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* *Lancaster* v. *Fraser*, 1 M. & S. 478.

prescribes nothing, save that some rule should be observed, and that that rule should not be inconvenient. Therefore, supposing the meaning of what is stated in Mr. Sellon's Practice to be that which is urged on the Court by the defendant, then it was said that the book was wrong. The practice is not taken from the book, but the book from the practice, and the book is of no authority, except so far as it coincides with the practice. Considering what is the foundation of the statement in the book, a single act of the Master would be quite sufficient to overrule its authority; and, in this instance, the rule of the Master is against the statement. But, besides, the practice is uniformly against the plaintiff. Such a rule as is claimed was never heard of, and the opinion of the Master, Mr. *Chapman*, upon the case, is this:—The plaintiff, by the practice of the Court, had the whole of *Hilary* vacation to enter the issue; not having done so, he was bound to enter it within the four days after the service of the rule for that purpose: not having done so, the judgment is regular.

Patteson J. The judgment was regular, but it must be set aside, the plaintiff having been misled by the books of practice. The rule to enter the issue, when given in any term subsequent to that of which issue is joined, is the same in town and country causes.

Rule absolute.— *Blunden* v. *Wheeler*. T. T. 1831.

TIME FOR PLEADING. — SURPRISE. — PRACTICE.

A defendant is not bound to give notice of his plea to the plaintiff when he has filed it at the exact time directed by the rules of the Court; nor is he bound to wait for a demand of plea.

V. Richards showed cause why an interlocutory judgment should not be set aside, it having been signed as for want of a plea. The facts were these:—On the 27th of January, the declaration was delivered; and on the 1st of February, under the advice of counsel, the plaintiff filed a demurrer. On the 12th of April, the plaintiff served a demand of plea, taking no notice of the demurrer which had been filed. He afterwards signed judgment as for want of a plea. This demurrer must be considered as a nullity, because it had been filed before the defendant was bound to plead, he not having been served with a demand of plea. If a party pleaded before he was bound, he must give notice to the other party, in order to prevent surprise. This was a principle laid down in two cases in the Term Reports, namely, *Thomas* v. *Prichard*, 4 Term Rep. 664., and *Parkinson* v. *Thomson*, 8 Term Rep. 596.

Patteson J. There the party pleaded of the wrong term.

V. Richards. Yes, but here they pleaded too soon, which is the same in principle. The demurrer is, that the process being in the King's Bench, the declaration is not headed "Ellenborough."

Patteson J. It does not signify what the demurrer is.

V. Richards. I submit, that where a defendant pleads before he is compelled to plead, he ought to give notice to the plaintiff, in order to prevent surprise.

Patteson J. In both those cases the party had a right to imparl to another term, and therefore the plaintiff was misled. But here he pleads at the very day he ought to plead. It is not necessary to wait till a demand of plea shall be made. There was no necessity to give notice to the plaintiff that the demurrer had been filed. The rule for setting aside the judgment must therefore be made absolute.

Rule absolute. — *Anonymous*. T. T. June 6. 1831.

ATTORNEY'S UNDERTAKING. — RULE OF COURT.

The Court will not make an attorney's undertaking a rule of Court.

Henderson applied for a rule to show cause why an attorney's undertaking should not be made a rule of Court.

Patteson J. We cannot do that. You may move for a rule to shew cause why the attorney should not fulfil the undertaking. But we only make agreements between the parties rules of Court.

Rule refused. — *Anonymous*. T. T. June 6. 1831.

FORM OF AFFIDAVIT — PLACE OF DEPONENT'S ABODE.

The Court will not reject an affidavit, because it is stated in another affidavit that the deponent has described himself as of a place not in existence.

Platt objected to the reading of an affidavit, because it did not comply with the rule of Court, which requires that the place of a deponent's abode should be truly set forth in the affidavit. He made this objection on an affidavit, that there was no such place in existence as that which the affidavit described as the deponent's place of abode.

Campbell, contrà. The affidavit does comply with the rule of Court; for it purports on the face of it to set forth the deponent's true place of abode. If it does not set forth the true place of abode, that fact can only be ascertained by an affidavit in reply; and the admission of such an affidavit is quite contrary to the uniform practice of the Court. If the statement in the affidavit be false, the proper course is to indict the party for perjury.

Platt. How can we indict him for perjury on this affidavit?

Patteson J. You might allege it thus; that he was bound to set forth his true place of abode, and that he did not do so.

Platt. But in the case of infringements of the rule, that an affidavit must not be sworn before an attorney in the cause, it is the constant practice of the Court to permit affidavits, that a party is an attorney in the cause, before whom the affidavit appears to be sworn, to be read.

Patteson J. Yes; but there, that is the only mode in which that fact can be brought before the Court. But here you have the remedy of an indictment for perjury in your power. I think the affidavit may be read.

The affidavit was accordingly read. — *Anonymous*. T. T. May 28. 1831.

LAW PROMOTION.

On the 28th ult. Francis Pearson Walesby, Esq. B. C. L., Anglo-Saxon Professor in the University of Oxford, and Barrister-at-Law, was elected by the Mayor and Corporation of Woodstock Recorder of that Borough.

MINOR CORRESPONDENCE.

ACCOUNTANT ACTING AS AN ATTORNEY.

I have been in the profession of the law some years, and have lately set up as accountant and collector of debts. I write letters to parties to whom I apply for debts before I summon them (and which often has the desired effect); or before I cause a Marshalsea writ to be issued by a proper attorney of that Court, or any other legal process in which I employ an attorney. Am I liable to a penalty for sending such letters? I make no charge for the letter to the parties *to whom* I apply for the debt; but charge the party *for whom* I apply 1*s*. Having been threatened to be reported to "The Metropolitan Law Society," I take the liberty to ask your opinion. I beg to enclose for your perusal, a copy of the form I generally use in writing such letters.

N. B. I.

We think that "N. B. I." is liable to be prosecuted for acting as an attorney, not being duly qualified. The form which he has sent us of his circular letter to debtors, in which he is accustomed to threaten the commencement of legal proceedings, is one that can be lawfully written only by an attorney. The smallness of the charge, and its being claimed from the creditor only, can make no difference in the case. He may of course apply for payment of debts, as a commercial agent or accountant; but he must beware of acting as, or doing that which belongs to the office of, an attorney.

SHARP PRACTICE.

The attorney of the holder of a dishonoured bill of exchange issued four writs of *quo minus* against as many different parties to the bill, all of whom reside in the county of Middlesex, and within a mile of each other. As the attorney could have put the four defendants into one writ, will he, upon taxation, be allowed the full costs of the four? He admits that one writ would have been sufficient, but denies that he was *bound* to issue *only* one. The writs were issued in August; consequently not returnable till November, and no difficulty was experienced in serving the defendants, and no object was to be attained by such a glut of writs beyond that which is too palpably vile in itself, and in the same degree injurious to the respectable portion of the profession.

H. C.

DELAYS AT THE STAMP OFFICE.

Your correspondent *H. B. A.* has very properly complained of the delays at this office; but there is one occasion of those delays which he has not noticed, viz. that for half an hour in the day the *whole* of the stamping machinery is stopped for the workmen to dine, and numbers of persons are during this time (in addition to the usual delay in other parts of the day), kept waiting for their deeds, &c. When it is considered how highly important it frequently may be to have a deed *immediately* stamped, to say nothing of the valuable time consumed in waiting, I trust something will be done to remedy the evil.

J. N.

ANSWERS TO QUERIES.

NEW RULES. — FILING DECLARATION. P. 351.

1. The rule referred to might have evinced in its framer more knowledge of the subject, and been more clearly expressed; but I think that it would be very hazardous to try the experiment proposed by "A Subscriber" of *filing* declaration conditionally the day after the return of the writ; for although the rule only states that no declaration shall be *delivered de bene esse*, until, &c.; yet, considering that the object and *spirit* of the rule is to give time to defendants to settle without the expense of declaration, I am of opinion that the Court (should a question upon the construction arise before them) would hold that it extends to filing also, otherwise the rule might easily be rendered almost a nullity, in the way proposed, which *in terms* it nearly is at present, for a declaration can only be *delivered* conditionally where *special bail* has been put in, when it is indorsed delivered until bail is perfected. So that if the rule were to be strictly rendered, and your correspondent's construction were to prevail, the *quantum* of good to be effected by it would be as trifling as the *quantum* of folios in a declaration when there *is* one.

It seems to be generally considered that the rule will be remodelled, which it evidently requires for the benefit of *suitors*.

H. C.

2. I think that the construction of the new rules would not be in favour of "A Subscriber;" and that his declaration, if filed before the sixth day after service or arrest, though conditionally, would be irregular. The object of the rule is, to let the defendant have the benefit of six days to settle, without incurring the additional costs of declaration. The former practice of filing declarations conditionally on the *very return day* of the writ, is very properly checked by this new rule.

F. G.

CHANCEL. — SURPLICE FEES.

The cases of *Clifford* v. *Wicks*, 1 B. & A. 498., and *Beckwith* v. *Harding*, ibid. 508., are authorities destroying the Querist's presumption that the chancel belongs to the lay impropriator. Though he is bound to repair it, he has no other right there than that of a seat, whether resident or non-resident. The vicar might have objected to open the ground, and therefore the fee of two guineas was not unreasonable or improper.

C. S.

PRACTICE. — DISCHARGING MORTGAGE. P. 551.

A mortgagee whose money is not paid on the day appointed by the proviso, is entitled to six calendar months' notice. *Sharpnell* v. *Blake*, 2 Eq. Ca. Ab. 603. pl. 34.; and in the case of a tender, it must be made on the precise day of the expiration of the notice, or he may claim another. *Hix* v. *Ling*, Powell, Mort. 934. 5th edit. As the payment of a quarter's interest, in lieu of six months' notice, is at the option and for the accommodation of the mortgagor, the transaction is neither within the letter nor the spirit of the usury laws.

C. S.

DEVISE. — ISSUE. P. 550.

The reversion in fee of the estate devised to A. B. for life, descended to the testator's heir during the life of A. B., upon whose death the devise of the testator's "real estate" carried it over to C. D., who may now convey without fine or recovery; neither of which, supposing he took a less estate than the fee, would bar the executory devise to E. F. C. S.

GAME QUALIFICATION, P. 550.

This query may, I think, be safely answered in the affirmative. An estate of *inheritance* of the *clear* annual value of 100*l.*, is a qualification by stat. 22 & 23 Car. 2. c. 25. A *life* estate must be of the value of 150*l. per annum*. *Lowndes* v. *Lewis*. Cald. R. 188.

That the benefit of the qualifications under the statute above cited (and which are to be looked upon rather as *exemptions* from *penalties*. Black. Com. vol. ii. p. 418., and vol. iv. p. 174.) extends to infants, cannot, I think, be doubted, and I believe has never been questioned. In order to exclude them the statute must have made *full age* a qualification; and the *intention* of the legislature *not* to exclude infants may be inferred from the circumstance of this statute expressly qualifying certain sons and heirs apparent, who, for the most part, are necessarily minors. F. G.

BANKRUPTCY OF TENANT FOR LIFE. P. 562.

In answer to the enquiry of a correspondent in our last number, respecting the bankruptcy of a tenant for life, with a power of appointment, we have to inform him that the Judges have made their certificate, and have decided that the son took nothing under the appointment, but was held to take an estate tail under the settlement. The case is that of *Badham* v. *Mee*, and has just been reported by Mr. Bingham, 7 Bing. 695.

PAROCHIAL REGISTERS, p. 36.

In reply to *A. C. A.*'s enquiry, the legal sum for searching and taking extracts (a certificate) of christenings, marriages, and deaths, from parochial registers is two shillings and sixpence.

J. H.

QUERIES.

LETTERS OF ADMINISTRATION.

WHERE a party dies, possessed of property in different dioceses, leaving a will, of which he has appointed *A. B.* executor; and *C. D.*, ignorant of the existence of the will, obtains letters of administration from one diocese, and previous to the will being proved, receives the amount of a debt due to the testator from a debtor residing in a different diocese: is that payment by the debtor sufficient to discharge him from his liability to the executor? and if so, how should the executor declare in an action against *C. D.* the administrator? J. J.

SHERIFF'S POUNDAGE.

Can the Sheriff *in any case* enforce the payment of poundage on a *ca. sa.*, or, at all events, is he entitled to it when the plaintiff has lost both debt and costs by the defendant being discharged under the insolvent act; and as various opinions are entertained on this subject, where can any decisions respecting it be found?

P. W.

MISCELLANEA.

OLDEST LAW-BOOKS.

IT is remarkable that the oldest book in the German law is entitled "Spiegel," or the Looking-glass, which answers to our Mirror for Magistrates: it was compiled by Eckius de Reckau, and is inserted in Goldastus's Collectanea. One of the ancient Icelandish books is likewise styled "Speculum Regale." There is also in Schrevelius's Teutonic Antiquities a collection of the ancient laws of Pomerania and Prussia under the title of Speculum. Surely all this cannot be the effect of pure accident.

[*From* H. F. H. *a Correspondent.*]

The Legal Observer.

VOL. II. SATURDAY, OCTOBER 22. 1831. No. LII.

> ——— "Quod magis ad NOS
> Pertinet, et nescire malum est, agitamus."
>
> HORAT.

LETTERS TO THE LORD CHANCELLOR.

LETTER VII.

ON THE PASSING OF THE BANKRUPT BILL.

MY LORD,

I TAKE the liberty of addressing you on a subject which now presses on the attention of the profession and the public. The bankrupt bill may be considered as passed. It has been read a third time in the House of Commons, and the other ceremonies necessary to render it the law of the land are mere formalities.

I shall not now enter into the principle of the measure. This has been sufficiently discussed in these pages. I am chiefly anxious at present to examine the reasons which have been given by your Lordship and your friends in the House of Commons for passing this bill, and to see whether they will bear a scrutiny. I shall take those which have been mainly insisted on in the debate; and, if they prove to be insufficient, it would seem to follow that this measure cannot be defended at all.

The bankrupt bill has naturally enough called out all the lawyers of the House. Its defenders among them have been the Attorney and Solicitor-General, who acted on their official retainer; Mr. Pollock, who, it is rumoured, has accepted the office of Chief Judge under it, and Mr. Serjeant Wilde. Its opposers consist of all the other lawyers of the House, who have come forward and severally expressed their opinions against the measure. This circumstance alone would seem to have rendered delay indispensable. But no; however late in the session, it must be pushed on. The ministers are supported by a majority who profess to understand nothing about it, — who vote for the bankrupt bill merely as a rider to the reform bill they so lately passed,—who yawn over the provisions for which they vote, — and whose main desire is to get rid of it, that they may escape to the luxuries of their recess. I have diligently attended the discussion, and I may safely say, that the numbers under the gallery have generally exceeded those in the House. It is a farce, then, to suppose that this bill is passed with the fair and deliberate approval of the country, when almost every opinion which is at once unbiassed and important has been given against it both in principle and detail.

Let me remind you, my Lord, for a moment, of some of the members who have spoken against it. Sir Edward Sugden, Sir Charles Wetherell, Mr. Knight, Mr. Pemberton, Mr. Burge, and Mr. Freshfield, have all expressed their deliberate and earnest disapprobation of it. Now, is this a mere faction? It is idle to say so; but in this instance it is also absurd; because, unfortunately for the measure, the opposition has been accompanied by an exposure of the bill so complete and unanswerable, as to render the notion of faction ridiculous. Now, therefore, permit me to consider the reasons given for bringing in the bill.

First, it is said that it will diminish expense. Let us look at a few items. The expense of the present seventy commissioners is, at an average of 380*l.* * a year each, 26,600*l.* a year in the whole. The expense of the judicial part of the new measure is as follows: —

	£.
Chief Judge - - -	8000
Three Puisnes at 2000*l.* -	6000
Six Commissioners at 1500*l.* -	9000
Two Registrars at 800*l.* -	1600
Eight Dep. Registrars at 600*l.*	4800
Total -	£ 24,400

So that 24,400*l.* will be paid, under the new system, for the services of twenty persons; while under the old one, the services of seventy were obtained for 26,600*l.* This appears an odd sort of economy. But

* See return made to the House of Lords; Monthly Record for March, page 88.

let us take another point. The sum paid to the Lord Chancellor for a commission under the old system was *5l.* 2*s.* 8*d.** The sum to be paid in future for a *fiat* in lieu of a commission is 10*l.*†; and the other fees are in the same increased proportion. But the greatest item of increased expenditure is yet to come. Under the old system, the assignees could make their own bargain with an accountant, for the collection of the bankrupt's effects. Under the new system, they *must* employ one of the thirty official assignees appointed by your Lordship under the bill, on the terms mentioned in the bill. And what are those terms? As the bill stood in committee, the commissioners were to have power to give *5l.* per cent. out of the bankrupt's estate, on the whole amount of the credits of the estate realised by such official assignee. Now, what will be the practical working of this clause? Why, of course, every official assignee will demand of the commissioners this remuneration. If the assets be large, he will talk about his responsibility; if small, the commissioners will be reminded of the trifling sum to which the per-centage will amount. An effort will, of course, always be made to obtain the *maximum* that can be allowed; and doubtless it will generally succeed. The commissioners will be swayed by the particular circumstances of the case; it is not their money, and they will generally listen to the prayer. Now, has your Lordship calculated what this *5l.* per cent. will give to each official assignee. If not, allow me to call your attention to a few figures. There are at present fourteen lists of commissioners; and on the average, I am well informed, they have each sixty commissions to work in the year. A calculation has recently been made by one having the most ample materials for coming to a correct conclusion on the point; and it has been ascertained, that the realised assets of every commission amount, on the average, to 10,000*l.* at least.‡ The calculation then is simple enough. There are 840 commissions worked in a year, and the whole amount of assets collected amount to 8,400,000*l.* A per centage of *5l.* per cent. on this sum will be 420,000*l.* This sum, then, by the agreeable climax of this account, is to be divided between the thirty assignees appointed by your Lordship. They will then each enjoy the inconsiderable sum of 14,000*l.* per annum; or taking it that they are occasionally frowned upon by the commissioners, and meet with other mischances, they may perhaps only obtain one half of that sum, or possibly one quarter! If they are even driven to this fearful extremity, they can hardly rail on your Lordship for your illiberality. Starvation even on this will not stare them out of countenance! Now, it is to be remembered that these official assignees are an entirely new burden imposed on the creditor. They spring from the unassisted invention of your Lordship; engendered in your brain, they leap full grown and thirty strong, at once into the mercantile world: their machinery, so well adapted to drain for their own benefit the impoverished resources of the creditor, has no parallel in the old system. And yet the measure is to save the country expense! Why, these official assignees will be in themselves more expensive than the whole of the late commissioners of bankrupt. But really this part of the subject cannot be longer dwelt upon with good temper.

Then again, my Lord, it has been your frequent and almost daily boast, re-echoed by your friends in the House of Commons, and reverberated by all your broad-sheeted adherents throughout the country, that in this bill you are making an enormous sacrifice of patronage. If the assertion has been questioned for a moment, you have started up in virtuous indignation; declared that it was as clear as the light of the sun, and as incontrovertible as a mathematical axiom. Doubts might be entertained whether the part was greater than the whole; but that you were parting with the best jewels of your office, without equivalent, was too certain to be denied for a moment. Let us see then, my Lord, what you give up by the present bill, and what you obtain.

And first, let me observe, that the only fair way to make the enquiry, is to try it by the test of one year from the present time. The appointments which you derive from this bill must of course be immediately at your disposal, as it is to come into operation on the 11th of January next.

* See Eden's B. L. 2d ed. p. 115. App.

† Clause B. of bill as amended in committee.

‡ This average appears to be taken too high. There are many commissions in which the assets collected are small; and we doubt whether the large commissions make up the difference. However, if the average be taken at one half the amount, the main positions of our correspondent would still be very well supported, particularly as we think he *understates* the number of commissions. During the last six months, from April to September inclusive (as will appear by our Monthly Record), there have issued 654 commissions, being at the rate of upwards of 1300 annually.—Ed.

Six or three months, therefore, would perhaps be more correct; but let us take a year, and enquire what patronage your Lordship would have under the old system in that period at your disposal, and what you will have under the act just passed.

It is well known that the annual number of commissioners of bankrupts at the disposal of the Lord Chancellor is, on the average, from three to four. Your Lordship, with your usual good fortune, has had six. Lord Lyndhurst was in office nearly four years, and had only thirteen; but I will take the highest amount — say four, at 300*l.* a year—and it is clear that you abandon 1200*l.*, or four offices of 300*l.* a year. The bill also abolishes some patent offices and fees, and gives the holders compensation. The first is "the Patentee of Bankrupts." This office is now held by the Rev. Mr. Thurlow for his life; remainder to Mr. Scott, Lord Eldon's son, a man about forty years old, for his life. Your Lordship here, then, sacrifices your chance of outliving two other men, *and* of being in office at that period, *and* of then making an appointment. This chance, perhaps, if tried by the usual rules of survivorships, and other little accidents, would not be of very great value! Your Lordship has, however, without condescending to hint at these usual rules, declared that in this one office you have sacrificed patronage to the amount of 10,000*l.* The plain fact is, my Lord, that here you have sacrificed nothing. The outcry had already begun about this office, and it must have been abolished whoever remained in office. Your Lordship, in this instance, has merely given up what you could not keep, and what if kept, would probably have been worth nothing. "Well, admitted; but what next does the Chancellor give up by this bill?" This will be the enquiry of every friend of your Lordship. I am really grieved that I am obliged to answer, that this is all that is relinquished. 1200*l.*, or four offices of 300*l.* a year, is the most exaggerated extent of the sacrifice. Four little mice of commissioners are the produce of this labouring mountain. This is literally the whole.

Now, your Lordship will see that it is perfectly fair to take the loss you sustain in this way by the year, because, assuming that you will remain in office much longer, you will have the opportunity every year of bringing in more bills giving to yourself new patronage and fresh places; and this does not rest on mere probability, but is reduced to absolute certainty, as, independent of the defunct County Court Bill, — that precious haul of patronage, — you have actually introduced the Lunatics Bill, which does, in fact, give you the disposal of nine or ten offices: so that your loss under the Bankrupt Bill is correctly ascertained, as above.

But now let us look at the gain to your Lordship. Not that you know any thing of it, or care for it! If it were vested in the Lord Mayor, or in your Lordship's butler, you would be as well satisfied! The offices would, perhaps, be as well filled up, and you would be saved the trouble! This is all very true; but as by some little accident the patronage is given entirely to your Lordship, let us just, for the curiosity of the thing, see how it stands; and as you have, I dare say, never made the enquiry before, it will, at least, have the charm of novelty!

First, then, my Lord, I have the gratification of assuring you, that you will have ten Judgeships, the snuggest things in the world, at the salaries I have mentioned before, having just 18,000*l.* between them. *Then* you will have two registrars and eight deputy registrars, with 6100*l.* a year to console them. *Then* your secretary of bankrupts is to have 1200*l.* a year, retaining, I believe, his fees on country commissions, and exchanging a permanent for a moveable office; his first clerk being also blest with 500*l.*; and your Lordship will also be gratified by learning that the most genteel and liberal arrangements are made for the retirement or sickness of all these excellent persons. *Then*, my Lord, comes the official assignees: you will be glad to hear, however, that there are *only* thirty of them; and as they will only have 14,000*l.* a year each, you will, no doubt, have some difficulty in persuading persons to accept them! I am glad, therefore, to hear that your Lordship has already received 800 applications from persons willing to abandon all private and interested motives, and devote themselves to the good of their country. But, my Lord, the trouble that the bill will force on you, you will regret to hear, is almost without end. You will, under this bill, have to give your sanction to the appointment of, probably, 500 country commissioners, all of them more or less valuable appointments, and who cannot be appointed without your assent. The dismal catalogue of your griefs is wound up, however, by that redeeming word *compensation*. Not, indeed, as was first intended, to yourself — that is reserved, it seems, for a supplementary bill — but to your officers. The Clerk of the Hanaper, the Purse Bearer, the Ushers, the gentlemen of the Chamber, the Chaffwax — ay, even the Chaffwax

—are all to be made happy by compensation. "Although they have had no hand in the death, they will receive the benefit of the dying." Happy band of placemen! let them raise a chorus of joy that, although they might have all been turned out the next week, they are now secure for life.

Now, my Lord, this is positively *all* that you get for your thoughtless abandonment of four offices at 1200*l.*; only fifty-two offices at 444,000*l.*, and the right of approval to about 500 others. This is the whole of the sacrifice that you have been induced to make. I dare not trust myself in any comment on this; neither is it necessary.

And now, my Lord, here for the present I leave this subject. I know not whether you are to be considered as amenable, like other men, to the ordinary tribunal of public opinion; whether your conduct and your motives are to be tried by the usual tests. You may move in an atmosphere of your own, and be above the common class of mortals. You may be infallible, incorruptible, subject neither to spot nor decay; it may be wrong to measure you by ordinary standards, or criticise your actions and measures by the common rules of life. This may be so. I hope it is so; for, I must be permitted to say, that if this plan —this bankrupt bill—had been brought in and carried through by any other Chancellor, it would have been denounced from one end of the country to the other as a measure taken up without deliberation, and forced through without decency; as doubtful in its benefits and certain in its blunders; but, above all, as the most greedy assumption of power and place—as a job the most unequivocal and revolting—which ever came from the hand of a minister.

I have the honour to be,
My Lord,
Your Lordship's most obt. servant,
A Barrister.

Lincoln's-Inn,
Oct. 19. 1831.

NEW BILLS IN PARLIAMENT.

LUNATICS.

Analysis of a Bill, intituled, An Act to diminish the Inconvenience and Expense of Commissions in the Nature of Writs De lunatico inquirendo, *and to provide for the better Care and Treatment of Idiots, Lunatics, and Persons of unsound Mind, found such by Inquisition.*

This bill recites that great inconvenience and expense have been experienced from the practice of directing commissions in the nature of writs *de lunatico inquirendo* to three or more persons; and that doubts have arisen whether such commissions can be directed to one commissioner only.

It is therefore proposed to be enacted, that it shall be lawful for the Lord Chancellor, &c. to cause any commission in the nature of a writ *de lunatico inquirendo* to be directed to any one or more person or persons, who shall make inquisition thereon, and return the same into the High Court of Chancery, and who for that purpose shall have the same power to issue precepts to the sheriff to summon a jury, and to compel the attendance of witnesses, and the production or attendance of the alleged lunatic, and all other the powers hitherto possessed by the three or more commissioners; and such inquisition shall be as valid as if the commission had been directed to, and the said inquisition returned by, three or more commissioners, as heretofore.

And reciting that it is expedient, for the better care and treatment of idiots, lunatics, and persons of unsound mind, found such by inquisition, that proper persons should be appointed to superintend, and from time to time report to the Lord Chancellor, &c. the care and treatment and state of every such idiot, lunatic, and person of unsound mind,—

It is therefore proposed to be further enacted, that it shall be lawful for the Lord Chancellor, &c., by an instrument under hand and seal, to appoint persons to be visitors during pleasure, for superintending, inspecting, and reporting upon, under the order and direction of the Lord Chancellor, &c., the care and treatment of all persons found idiot, lunatic, or of unsoud mind, by inquisition, and to make all such orders and regulations as to the duties of such visitors, as the Lord Chancellor, &c. shall from time to time think fit.

That as often as any of the visitors to be appointed shall die, refuse to act, or become unable, by illness or otherwise, it shall be lawful for the Lord Chancellor, &c. to appoint others.

That no person shall be appointed visitor, who shall be, or shall have been within the two years preceding, interested in the keeping any house licensed for the reception of insane persons; and if any person shall after his appointment become so interested, and continue to act as such visitor, his appointment as visitor shall thenceforth become null and void.

That the Lord Chancellor, &c. be empowered to appoint, during pleasure, fit persons to be secretary and clerk to such visitors.

CHANGES IN THE LAW EFFECTED DURING THE LAST SESSION.

No. II.

JUDGMENT AND EXECUTION.

The statute to which our remarks will now be directed, is the Judgment and Execution Act introduced by Lord *Tenterden*.[a] This is perhaps one of the most useful acts introduced since the Law Commission has been appointed. The advantage conferred on the suitor, in enabling

[a] 1 W. 4. c. 7. For the act at length see Monthly Record for June, 1831.

him to obtain with certainty the fruits of his verdict; and on the administration of the law, by thus removing temptation to vexatious defences, for the mere purpose of gaining time or defrauding creditors; must be so evident, that we shall occupy our readers by no further remarks on it.

The first section authorises the making writs of inquiry returnable an any day in vacation. Before this enactment, all such writs must have been made returnable on general return days or days certain, in term, according to the nature of the proceeding. [b]

The second section enables any judge of assize, in his discretion, to direct by his certificate that execution shall issue for the whole or any part of the sum to which the verdict amounts, immediately or at a future day, either with or without condition or qualification, on which "a rule for judgment may be given, and costs taxed and judgment signed," and execution issued according to the terms of the certificate; the plaintiff being left to determine whether he will so sign judgment, when he has obtained the certificate. This section is materially restricted, as to the taxation of costs, by the sixth. That provides, that no officer of any of the "Courts shall, for the purpose of taxing costs on any judgment to be signed by virtue of this act, be compelled to attend at any time between the last day of *August* and the 21st day of *October* in any year." Unless, therefore, the costs are taxed at some time either before or after this period, the plaintiff cannot issue execution for them. There can be no doubt, however, that if the plaintiff choose, he may waive his costs, and issue execution for the debt alone. This may be important to do where the sum is large. It is more than probable the Courts will decide, that the plaintiff is not bound to forego his costs, notwithstanding this clause; and that, if he has not been guilty of *laches*, he may issue execution for the amount of the verdict. After stating the judgment, the writ of execution might proceed thus: — "and by reason of the costs of the said *A. B.* not having been taxed in the said action, the amount thereof is yet to be ascertained." Then afterwards, when the costs had been taxed, another execution might issue, setting out the judgment at length, but limiting the amount of the levy to the amount of the sum remaining to be satisfied. Or it might recite the former writ of execution, and then state the fact of taxation. The costs of this second writ must, however, be paid by the plaintiff. [c]

The words of the statute are, "a rule for judgment may be given." In the Common Pleas, however, no rule for judgment is necessary. [d] Still, we conceive, no rational doubt can exist, that the provision was intended to apply to the Common Pleas as well as the other two superior Courts. In those cases only where it is *necessary*, this provision must be taken to apply.

During the last summer home circuit, when Lord *Tenterden* presided on the civil side, he would only exercise the power with which the act invested him, in cases of exceedingly vexatious defences, or where there was reason to suppose the defendant intended to abscond.

Previous to these provisions, the rule for judgment could not be given, or judgment signed, until the day *in banc*, or first day in full term. [e]

The third section provides for the necessary details in carrying the privilege into effect; and the fourth empowers the Court, if it should think fit, to vacate the judgment, stay execution, arrest judgment, grant a new trial or new writ of inquiry; and that the party affected by such writ of execution shall be restored in those cases to all he may have lost. When the defendant intends to apply to the Court for any of the above purposes, it would be desirable that he should give notice of his intention to the sheriff, as well as the plaintiff's attorney, and also notice to the latter not to pay over the proceeds of the seizure. The sheriff would probably be liable to an action, if he should pay them over after notice, in case the execution should afterwards be vacated, and the plaintiff be unable or unwilling to pay, or have absconded. For he would have a discretion, as he is not bound to pay over the proceeds till the return day of the writ.

It will, however, thus be in the power of a defendant, however unrighteous his defence, to give notice to the sheriff, and delay the plaintiff until the success of his motion is known, or the time for moving has passed. We presume, that on producing an affidavit of merits, and an affidavit stating circumstances suffi-

[b] 1 Tid. Prac. 574. ed. 9.

[c] See 2 Dowling's Stat. 17., where a similar construction is put on the act.

[d] Barnes, 443. Pr. Reg. 410. S. C. Barnes, 445, 446. Pr. Reg. 410, 411. S. C. 1 Tid. Prac. 905. ed. 9.

[e] R. E. 5 G. 2. Reg. 3. (a) K. B. 1 Tid. Prac. 306. ed. 9.

ciently exculpatory of the defendant, for not making his defence at the time of the trial, a Judge would order the sheriff to retain the proceeds of the seizure in his hands until an application could be made to the Court above; for although the plaintiff would be delayed in his remedy, the *certainty* of it would not be endangered.

The fifth section saves the power given to plaintiffs in ejectment by the 11 G. 4. & 1 W. 4. c. 70. § 38. to obtain a writ of execution of a verdict, or nonsuit, for non-confession of lease, entry, and ouster.

On the sixth section we have already remarked. The seventh section repeals the proviso of the 108th section of the 6 G. 4. c. 16., the bankrupt act, by which it is enacted, "that no creditor, though for a valuable consideration, who shall sue out execution upon any judgment obtained by default, confession, or *nil dicit*, shall avail himself of such execution to the prejudice of other fair creditors, but shall be paid rateable with such creditors."

The increased and ruinous litigation produced by this provision was deprecated in almost innumerable instances.[f] Where a creditor found, that in case of subsequent bankruptcy he was to gain no advantage from not pressing his debtor, he would of course carry on his proceedings to judgment and execution, instead of accepting a *cognovit*, with stay of execution. This evil is now removed.

The two last sections make several regulations with respect to the returns of writs in the counties palatine of *Chester* and *Lancaster*.

MEDICAL JURISPRUDENCE.

No. VII.

HOMICIDE.

We conclude the last lecture of Professor Amos, in which he treated of some instances of homicide, occasioned by other means than poisoning.

In a case tried at Nottingham a few years ago, a prisoner was indicted for murder, in cutting a person's throat. It was proved in evidence that the deceased's throat was cut; but that he had also received a severe blow with a crow-bar on the head. No medical witness was subpœnaed, but the Judge asked, "Is there any medical gentleman in court?" Upon which a gentleman rose up, and said, "I am one, my Lord." "Have you heard the evidence?" "Yes." "Have you formed an opinion respecting the mode in which the deceased met with his death?" "Yes; that he died by the cutting of the throat, and not by the blow on the head." "What are the grounds of your opinion?" "Because the injury on the head, according to the description of it, though I think it would have produced death ultimately, would not have produced it so soon as it appears from the evidence the death must have ensued; and also because, if the deceased had been killed by the blow on the head, and afterwards his throat had been cut, so large a quantity of blood would not have flowed, as it appears from the evidence did flow from the wound." The opinion expressed by the medical gentleman was acquiesced in by the Judge and the jury, who, but for his accidental presence in court, might have acquitted the prisoner.

At the last assizes at Warwick, a child was proved to have died of a fracture of the skull on the back part of the head, just above the ear. The evidence was, the child had been put out to *nurse* with the prisoner: the prisoner was proved to have come down stairs, leaving the child in a room above stairs; the prisoner returned up stairs, and in two or three minutes came down again screaming, and desiring that the mother of the child might be sent for. The child was found dead on the floor. The prisoner had been heard, a week or more before, to use expressions of dislike to the child, as, by saying, "it should eat its own dung." The prisoner's case was, that the child had fallen out of bed on the floor in a fit, and so had met with its death. The prisoner said, that, in going up stairs, she heard a "bump on the floor." The case on the part of the prosecution was, that the prisoner must have knocked the child's head against the bed-post, or some hard substance. Only one medical witness was called, who swore, that, in his opinion, it was impossible that the child could have met its death by a fall. I should tell you, that the bed, from which the child was supposed to have fallen, was two feet high from the floor; the child was sixteen months old; and the injury, as I before mentioned, was on the back of the head, above the ear. The surgeon was very much pressed by the Judge, the counsel for the prosecution, and the counsel for the defence, who all seemed desirous of shaking his testimony. It appeared that he had only been three years in practice. At last the surgeon was got to say, that it was *not absolutely impossible* that the death might have been occasioned by a fall. And, upon this, the jury *acquitted* the prisoner.

In a trial for manslaughter at Lincoln, the prisoner and a constable had been struggling together, and the prisoner was striking at the constable with a spade; the spade glanced over the constable's shoulder, and hit the deceased, who was engaged in pulling away the constable. There was no doubt upon the point of law, that, although the blow was not intended for the deceased, the act would be equally as criminal as if the blow had fallen on the constable. But

[f] *Taylor* v. *Taylor*, 5 B. & C. 392. 8 D. & R. 159. S. C. *Wymer* v. *Kemble*, 1 Mont. Bank. Law, App. 23. 3d edit. *Notley* v. *Buck*, 8 B. & C. 160. 2 M. & R. 68. S. C. *Morland* v. *Pellatt*, 8 B. & C. 722. *Higgins* v. *M'Adam*, 3 Y. & J. 4. *Cuming* v. *Keale*, 4 M. & P. 238. *Mitchell* v. *Knott*, 2 Gl. & Jam. 26.

there was some doubt as to the question, whether the deceased died in consequence of the blow he so received. The medical evidence was as follows: —

Mr. *Harvey*.—"I am a surgeon of Lincoln; was called in to the deceased; he was sitting by the fire; had a handkerchief round his forehead; one inch above his eyebrow there was a lacerated incised wound, from an instrument with an edge—it might have been from a spade; found the skull fractured; there were two or three spiculæ, or small portions of bone; I was called in on the 11th, within an hour after his receiving the injury; I attended him till the 17th; he died on the 18th. Opened his head after death; he died of lock-jaw; lock-jaw attends on wounds slight or serious; the ultimate cause of death was the lock-jaw; cannot say positively that the wound occasioned death, because the disease of lock-jaw is imperfectly understood even by the first of the faculty; there were nerves very near the part injured; if the nerves received an injury from the wound, it would account for the lock-jaw, and subsequent death; believe that the wound did occasion the death; cannot speak positively; the wound was not sufficiently serious to have occasioned death, if lock-jaw had not ensued; if the deceased had applied brandy to the injured part, it would have produced great irritation; a very little scratch of the skin will sometimes produce lock-jaw; the brain was not injured."

Mr. *Best*, surgeon.—"Was called in on the 17th, at two o'clock in the afternoon (the injury occurred on the 11th, the death on the 18th); lock-jaw had not then taken place; there were symptoms of approaching lock-jaw; the lock-jaw was complete in two days after its first commencement; fair to presume that the death was occasioned by the wound; lock-jaw very likely to arise from such a wound, though it frequently arises from other causes, as *from cold*; and this was Christmas time, and very severe weather. The wound was one inch above the right orbit, and nerves were very near the wound; a prick from a needle or a thorn will sometimes produce lock-jaw. Found no cause of death but lock-jaw, and no cause of lock-jaw but the wound; had not an opportunity of observing whether any nerve was injured; should not have said, *à priori*, that the wound would have occasioned lock-jaw, or death." On which the Judge asked, "What would you say *à posteriori*?" Answer.—"Having heard what I have heard in court, it is no matter of surprise to me that lock-jaw followed from the wound. The wound was very superficial; no sloughing, no discoloration, no extravasation of blood, nor the slightest inflammation; not one vessel turgid; no fissure or fracture, a mere superficial injury to the outer table of the skull. I considered it a very superficial blow, not likely to produce death—a very slight wound at first." The Judge left it to the jury whether, in their judgment, the death was occasioned by the blow; and he said, that in his judgment the lock-jaw was occasioned by the injury to the head, as there was no account of any previous illness; and the jury found the prisoner *guilty of manslaughter*; though it was very doubtful whether the offence did not amount to murder.

Mr. Amos observed, that he had often seen medical men very much puzzled when the question was put to them, whether they believed the death of a person was occasioned by an injury proved in court to have been received; particularly where the injury had been capable of producing death, but the death might, without any violent improbability, have proceeded from another cause.

In a trial for manslaughter at Derby, the prisoner and the deceased had been wrestling. The prisoner had thrown the deceased with his head on a stone floor by an underhold from the thigh; he then seized hold of the deceased by the throat, and beat his head several times against the floor. This was about ten o'clock at night, and the deceased died about four or five the next day. He died on a Saturday. On the next Monday the head was opened, and the scalp removed. A great quantity of coagulated blood was found between the scalp and the bone of the skull. There was a wound on the right side of the head, on the parietal bone, an inch and a half in length, and penetrating through the scalp to the skull, but no fracture of the skull. There was a quantity of extravasated blood on the opposite or left side of the head. There was a rupture of some branches from the carotid artery inside of the skull. There were two discolorations on the neck, on the left side of the windpipe, apparently occasioned by the pressure of two fingers. The laying hold of the neck might be the occasion of a rupture of the vessels, being more easily made, by preventing the blood from returning. The surgeon, after giving this description, was asked whether, in his opinion, the death was occasioned by the injury proved in evidence. He said that the death might, or might not, have been occasioned by it. The death might have arisen from other causes. An apoplectic fit might have occasioned it. The surgeon had seen blood in the cranium of persons dying from apoplexy. The effusion of blood occasioned the death. "The deceased, when I was first called into him, was not able to see; this was on account of the pressure of coagulated blood on the optic nerve; the occasion of death was the pressure of coagulated blood upon the brain; not able to speak to the *cause* of the rupture in the brain; should think it highly probable that the injury received was the cause of death—it was certainly sufficient to account for it." I should observe, that in this case the Judge was very angry with the witness *for not stating at once that he believed the injury was the cause of death*. And the Judge made game of the witness by telling him to pause; not to commit himself hastily; to take time to consider; and using other such like sarcastic speeches. But the witness might have said that the blows were a sufficient cause to have accounted for the death; but that apoplexy, also, brought on by great excitation and drunkenness, was a sufficient cause, and the ap-

pearances within the head would be the same from either (which of the two, however, was the more likely cause, under the circumstances, to have occasioned death, is not so much a medical question, as an inference to be drawn by the jury from the evidence of the witnesses); and that the utmost the surgeon could say, would be, "here is a cause sufficient to account for the death; still the death might have been occasioned by another cause, and whether that other cause existed or not, it is quite impossible for me to say."

I may mention (said the lecturer) that in this case a surgeon was called upon in the night, just after the injury was inflicted; but he did not come till the next morning at ten o'clock. When he came, he said that the man was dying, and *therefore* there was no occasion for him to stop. He went away without examining the man's head, though he had been told that the man had received a severe injury upon his head. The Judge told this surgeon that the account did not do much credit to his humanity, and asked if the people in that county had not heads or brains? Upon which the counsel said, "It appears, my Lord, that the doctors in this county want both."

In another case of manslaughter, the surgeon proved that there was a swelling under the angle of the jaw on the right side. On removing the integuments from the swelling, there was a considerable extravasation of blood discovered. The surgeon then opened the head, and found a copious extravasation of blood at the base of the skull, which, in the witness's judgment, was produced by a blow under the angle of the jaw; and the surgeon was of opinion that the blow had struck upon the internal jugular vein, occasioning a rupture of a vessel within the skull, giving rise to the extravasation. Some witnesses had sworn that the prisoner had kicked the deceased on the neck whilst he was lying on the ground; and the surgeon was asked, in cross-examination, if there was any mark of a foot on the neck. The surgeon said no, but observed that the deceased having a neckcloth on, the neckcloth would prevent there being any distinct impression of a foot. The deceased was a prize fighter, and he had been fighting in the middle of the day, some hours before he received the injury which occasioned his death. The fight was at three o'clock, and the kick was given at about seven in the evening; and the counsel for the prisoner endeavoured to make out, from cross-examining the surgeon, that the deceased might have died from some injury received in the previous fight. Fortunately, however, for the ends of justice, the surgeon had not merely examined the head of the deceased, but had examined all his body; and although he found several bruises on various parts of his body, yet he could say, from their yellow colour and general appearance, that they were not recent bruises.

Though it was more a purely medical than a medico-legal point, Mr. Amos mentioned, that in case of manslaughter at Lincoln, the deceased had been killed by a blow on his side with a knife. The surgeon said that he found the deceased bleeding from a wound in his side; the wound was an inch long, through the cartilage of the ninth rib; part of the omentum protruded through the wound two inches, and a little more; the omentum itself was wounded by the knife; it could not be returned through the opening—the opening could not be enlarged with propriety; if the opening had been enlarged in one direction, the diaphragm would have been injured. "I cut off the omentum; I have read of many instances of persons recovering after such an operation had been performed, but I never knew of an instance within my own practice."

The learned Professor concluded his course with a case which occurred more than twenty years ago, and which is not mentioned, we believe, in any books of Medical Jurisprudence.

The question in the case was,—whether the deceased had died of the blow of a spade, inflicted by the prisoner, or whether he had died by a kick from the hoof of a horse.

The facts proved in evidence were as follow:—

"*Thomas Owen Jones* examined.—The witness is a surgeon, and lives at Henley; was sent for to attend the deceased; got there about half-past four o'clock; Mr. Burman was there before him. Both of them immediately proceeded to examine the body of the deceased. In turning the body, a prodigious effusion of blood took place, with a small portion of the brain issuing from the nostrils. They then ordered the body to be carried up stairs, and it was; there it remained till the following day, when they examined it minutely. On Saturday, the first wound they remarked was one on the left side of the head, about five inches long, extending from the front part of the head towards the back part; along the parietal bone, that above the ear, it was straight, without contusion; it had the appearance of an incised wound, inflicted by an instrument not having a keen edge. There was another wound above that, smaller, he believed—about two inches, or not so much; it was within half an inch of the other, or thereabouts; it was of the same nature as that below—straight and incised. On the right side of the head there were three wounds, two wounds about four inches in length; those wounds were on the parietal bone also; the third wound was lower, upon the temporal bone: these wounds were rather irregular, partaking both of lacerated and incised wounds. There was one on the hind part of the head, about two inches and a half long; there was not any tumefaction round any of the wounds, the integuments adhering firmly to the bones: except where the wounds were inflicted, the fracture of the skull was general throughout the right side; it extended along the back part of the head towards the left side; a small portion of the temporal bone came away. He thought those wounds could not be inflicted by a horse. The reason why they could not was, they were all distinct, and the integuments adhering so firmly, it was evident that they must have been made by an instrument.

If the wounds had been given by the kick of a horse, they would have been in a perpendicular direction instead of a lateral one, if the person lay on the ground at the time the wounds were inflicted. If the deceased had been standing up, all those wounds could not have been inflicted on the head inthe manner the witness saw them; he must have fallen from the first blow. If the horse had kicked the deceased both when he was up and down, they would have been different, he thought; the wounds would have been perpendicular in some measure, and not all lateral. He had no appearance at all of being kicked, or any other wounds on any other parts of his body; there was a very slight discoloration on the breast-bone, that he did not think worth notice. If the horse had kicked him on the chest, it certainly would have had other discoloration and appearance. He examined the mare that was near the body of the deceased; he examined her hind feet; there was no blood, none in the least; he looked to find if there was any most accurately. There was no shoe on the off foot behind; there was a shoe on the near foot behind; it was particularly smooth. From the state of her feet, when he viewed them, he did not think it possible for the wounds to be inflicted by that mare. He had no doubt upon that subject, from his knowledge and experience.—Q. We understand that the hat was upon the deceased's head when he was first found; look at the hat, and examine it. Would it have been in that state if it had been kicked by any horse? A. In order to produce the wounds I have spoken of, the hat must have been cut. Q. From your judgment, am I to conclude the wound could not have been made with the hat on the head? A. They could not. Q. You have no doubt? A. I cannot have any. Q. Was it possible for the deceased to have put on his hat after having received those wounds you have been describing? A. Oh! no, sir. Q. Would any of those wounds, or either of them, have killed him? A. Those on the right side would unquestionably have killed him. Q. Would they not have produced instant death? A. They must necessarily have produced death instantly. Q. You took the spade from Allibone? A. No, I did not. Q. Will you look at that instrument? Did you observe any blood at the time? A. Yes, I did. Q. Will you point out to the jury where it was? [Here the witness took up the spade, and described the blood to have been on both sides, and on the front side florid, near and close under the left tread.] A. The blood under the left tread was very florid. Q. You say very florid? A. Yes, it was. Q. As to the other? A. The blood on the back part was not so florid by a great deal; it was absorbed by dirt. Q. What judgment do you entertain as to the blood there being absorbed? A. It must have been in a fluid state, otherwise it could not have been absorbed. Q. Look at that instrument (the spade); I desire to know whether, in your judgment, it would not have produced those wounds which you saw? A. It would, or any similar instrument. Q. You said there was no tumefaction? A. None at all. Q. If inflicted by a horseshoe, would there not have been a great deal of tumefaction and contusion? A. By the kick of a horse it would have produced a great deal of it; there was none by these wounds.

"Cross-examined.—Q. What I understand you to mean by an incised wound is, one inflicted by an instrument with a keen edge, which will not bruise? A. Yes. Q. And that a wound inflicted by an obtuse instrument will be both cut and bruised? A. Yes. Q. How long have you been at Henley? A. Seventeen years. Q. Have you had fractures under your care from the kick of a horse? A. I never have been called to one whose skull had been fractured by the kick of a horse. Q. Then this opinion is all speculative and conjectural? A. Certainly; I did not see it done. Q. You never before examined such a fracture, therefore it is conjectural: look at that shoe, and see whether, in your judgment, a similar wound could not have been inflicted with the one as with the other. [Here he showed him the shoe and spade, and asked whether the shoe would not have inflicted a wound similar to one inflicted by the spade?] A. No, it could not, when nailed to a horse's foot. Q. Do you mean to say none of these wounds were curved? A. They were not, they were irregular; but I must call them straight. Q. I must ask you whether the edge of the hoof has not a sharp appearance? A. Certainly it might. Q. Is it capable of giving a wound both lacerated and incised? A. Certainly it would. Q. You have told us you were not called in till after the body was removed, so that you cannot tell us in what condition the hat was when it was found. Is it impossible to receive a fracture with the hat on, and it not cut? Was it impossible to receive these wounds without the hat being cut? A. I do not think they could without the hat being cut? not wounds of that nature. Q. Do you mean to swear that they could not be received without the hat being cut? A. It is so in my judgment. [Here his Lordship observed, that he remembered an instance where it was proved, on a trial at the Old Bailey, that a cut and fracture had been received, and the hat not cut.] Q. Then men may receive wounds on the head of that nature, and the hat not be cut? A. I did think they could not till my Lord said otherwise.

"Re-examined.—Q. Supposing the body had been kicked while on its legs, would it have produced the wounds you have seen? A. No, it would not. Q. Could those six wounds have been inflicted without the hat being cut? A. It must have been cut.

"Mr. *Thomas Burman* examined.—Witness was a surgeon, lived at Henley; was present at the time Mr. Jones was at the house of Mr. Booth; examined the body of the deceased with Mr. Jones. Q. In your judgment, by what sort of instrument were these wounds inflicted? A. Had I only seen one on the right side, I should have supposed it had been done by the kick of a horseshoe; but what made me suppose they were not, was the slight separation of the integuments from the cranium, and the wounds being distinct; I thought then they could not have been done by the kick of a horse. Q. Was there more or less of contusion than would have been occasioned by the kick of a horse? A.

There would have been greater contusion and separation of the integuments: these were the appearances which I observed on the integuments, but I do not exactly recollect any other appearances. It appeared to me they were inflicted by an obtuse instrument. Q. Will you look at that spade? In your judgment, could they have arisen from that? A. More probably from an instrument like that than from the kick of a horse. I have been called in to four cases, and in all of them the wounds were inclined to curve. Q. What was the shape of these which led you to conclude that they could not have been inflicted by the kick of a horse? A. There was no inclination to curve."

COSTS UNDER THE NEW RULES IN THE COMMON LAW COURTS.

We were promised a list of the proposed alterations in the Table of Costs, rendered necessary by the new rules of Trinity term; and trust it will be sent without further delay. We adverted to this subject some time ago *; and beg to suggest, that not only the correspondent to whom we have alluded, but other practitioners, should transmit their views of the subject. The members of the profession, as usual, seem disposed to attend to any thing rather than their own interests, which may be very disinterested and heroical; but then they must not be surprised, whilst *they* are wholly supine, that *others*, who have no direct concern in the matter, will follow their example.

We have our own opinions on the subject of professional emoluments, and would willingly put them forth; but as there are different views to be taken, and the details are numerous and important, we should prefer, in the first instance, to collect, so far as practicable, the sentiments of such of our subscribers as have considered the matter, and from their experience are qualified to form a judgment. We believe that both suitors and practitioners are agreed, that the remuneration for actual services should be liberal; but that all unnecessary proceedings and useless fees to sinecure officers should be abolished: so that the doors of our Courts of justice may be open as well to the poor as the rich; and that the fair practitioner may not be obliged to advise his client, in nine cases out of ten, to submit to injustice, rather than incur the risk of ruining himself to obtain it.

* *Vide* p. 266. *antè*.

ON THE QUALIFICATIONS OF A LORD CHANCELLOR.

To the Editor of the Legal Observer.

In the last Number (LI.) of the Legal Observer, published on the 15th of October, you ask, "Who is to be the Chancellor?" and answer the question in a very summary way, much, I have no doubt, to your satisfaction; but, with all due deference, I think you should have first told your readers, by way of premises, what are the duties and necessary qualifications of a Lord Chancellor (which would have been an easy matter, since you must necessarily have taken them into your consideration before coming to the conclusion which you have done), to enable them to judge whether or not it is a right one: and as you have omitted so do so, you must allow me to supply the omission upon the authority of equity lawyers, whose like, I fear, we shall never see again; and, in doing so, I will imitate your example, by confining myself strictly to the legal part of the Lord Chancellor's character, abstaining altogether from its political part, for I hope the Legal Observer will never become an arena for the discussion of party politics.

Mr. Bell, in a late pamphlet entitled "Thoughts on the proposed Alteration in the Court of Chancery, as to the Appointment of an additional Judge," says, "The idea entertained by many *professional* men † in other Courts, that the doctrines of a Court of equity are only the principles of common law, modified by sound discretion in cases of individual hardship, incident to general rules, though true if we look to its origin, is now far from correct; it is in many respects *a distinct system*, but in which there is still more discretion to be exercised than the common law allows." And in the debate on the 17th of May, 1811, on Mr. M. A. Taylor's motion that a committee should be appointed to enquire into the causes that retarded the decision of suits in the High Court of Chancery, Sir Samuel Romilly said, "that the whole system of equity in this country *was founded on the decisions of successive Chancellors, from Lord Northington down to the present time*, and it was necessary that those who had to administer the equity laws of this country *should be in the constant habit* of deciding original causes." And the same learned lawyer, on the debate which took place on the 11th of May, 1813, on the second reading of the bill for appointing a Vice Chancellor, said, "The person filling the situation of Lord Chancellor ought to be a man *perfectly well acquainted with the law of real property* — a law which was to be acquired only in the course of *practice* — which must, *in the first instance*, be un-

† If *professional* men err so greatly, it is not surprising to hear other persons talking of any person being qualified to be Chancellor, for he has only to decide according to his conscience, as if he were bound by no rules or prior decisions! Conscience is capable of great tension and contraction; and that of a Chancellor would dilate and contract very much, if not confined by former decisions.

derstood by deep and sedulous study, *before a lawyer commences his career in that branch of the profession. He should be a perfect master of the doctrines of equity;* which were, in fact, *dicta* emanating from the Lord Chancellor,—*not from him who immediately exercised the functions of the office,* but from his predecessors, extended and enforced by himself. And it was most important that the Chancellor should also be acquainted with all the persons who practised the law; this was necessary, because the whole patronage of the law was in the hands of the Lord Chancellor. Why, then, should such a power as this be placed in the hands of a man *ignorant of the Court of Chancery,* incapable of judging of the individual merit of lawyers, and who would be *only important as a great political engine?* The person elevated to the rank of a Chancellor should have a *practical* knowledge of the state of business in this Court, that he might be able to expedite it, to correct any abuses which might be observable, *and to bring back the practice to what it was in former times.*" And with regard to the necessary qualifications for a Judge in bankruptcy, Sir Robert Gifford, (who, though an excellent common law and real property lawyer, is said to have felt most sensibly his want of knowledge of the principles and practice of a Court of equity,) in the debate on the 20th of May, 1819, on Mr. M. A. Taylor's motion for a committee to take into consideration so much of the 15 Eliz. c. 7. as gives jurisdiction in matters of bankruptcy to the Lord Chancellor, said, "he was surprised to hear it stated, that questions of bankruptcy were not in their nature questions for an equitable jurisdiction. Courts of law often decided questions of fact in the course of a bankruptcy case, but the general merits fell peculiarly within the province of Courts of equity; nor did he believe any man, *whatever might be his learning and ability,* qualified to decide them, *unless conversant both with the principles and practice of these Courts.*"*

I shall make no comment on these extracts; but, leaving them to speak for themselves, only take leave to make a trifling alteration in your question, and ask you in return, "Who *ought* to be the Lord Chancellor?" which question ——I was proceeding to answer — but will stop here at present. H.

NOTES OF THE WEEK.

MASTER OF THE ROLLS.

It is rumoured that the Master of the Rolls (who is at present abroad) has retired. We have not been able to ascertain its correctness.

NEW BANKRUPT JUDGES.

It has been stated, on some authority, that Mr. Baron Bayley would be the new Chief Judge in Bankruptcy. We know this to be incorrect. It was neither offered to him, nor would he have accepted it. It has, we believe, been offered to Mr. Pollock, but declined. The following gentlemen will certainly be included in the new arrangements — Mr. Serjeant Pell, Mr. C. F. Williams, Mr. T. Erskine, Mr. Fonblanque, and Mr. Fane.

* This may assist the Lord Chancellor in selecting proper persons to be Judges of the new Bankruptcy Court.

MOTIONS IN PARLIAMENT RELATING TO THE LAW.

Building Act.

Mr. Hughes Hughes.—Bill for the regulation of buildings and party walls, and for preventing mischiefs by fire, and injuries to the lives and property of his Majesty's subjects, from the injudicious construction of buildings. (Next session.)

General Register.

Mr. Campbell. — General Register Bill. (Commencement of next session.)

Friendly Societies.

Mr. Wilks. — Bill to amend the act 10 G. 4. c. 56. to consolidate and amend the laws relating to friendly societies.

SITTINGS IN THE SUPERIOR COURTS.

MICHAELMAS TERM, 1831.

COURT OF KING'S BENCH.

Before Lord Tenterden.

IN TERM.

MIDDLESEX.		LONDON.	
Tuesday	Nov. 8		
Tuesday	15		
Wednesday	23	Thursday	Nov. 24

AFTER TERM.

Saturday	Nov. 26	Monday	Nov. 28

The Court will sit at eleven o'clock on the 8th, 15th, 23d, and 24th of November, and at half-past nine o'clock on the other days.

Causes in the List on the 8th and 15th of November, not disposed of on those days, will be tried by Adjournment on the two following days, Wednesday the 9th and Wednesday the 16th.

Undefended Causes only will be tried in *London* during the Term, *viz.* on Thursday, 24th November.

COMMON PLEAS.

Sittings before Sir Nicolas Conyngham Tindal, Knight.

IN TERM.

MIDDLESEX.		LONDON.	
Thursday	Nov. 10	Friday	Nov. 11
Wednesday	16	Thursday	17
Tuesday	22	Wednesday	23

AFTER TERM.

Saturday	Nov. 26	Monday	Nov. 28

The Court will sit at eleven o'clock in the forenoon on each of the days in Term; and at half-past nine on each of the days after Term.

SUPERIOR COURTS.

COURT OF KING'S BENCH.

ARREST.—MISNOMER.—PRACTICE.

Where a defendant has been arrested by a wrong name, and the plaintiff has not declared, the Court will discharge him out of custody, although four days have elapsed from the time of arrest.

Clarkson showed cause against a rule for discharging a defendant out of custody, on the ground of his having been arrested by a wrong name. The defendant had taken no steps to relieve himself for four days after his arrest. The time for pleading in abatement having therefore elapsed, the present application came too late.

Kelly, in support of the rule. The plaintiff has not declared, and therefore the defendant could not plead in abatement.

Rule absolute.—*Anonymous.* T. T. June 8. 1831.

INSOLVENT ACT.—DISCHARGE.—FRAUDULENT PREFERENCE.

Where a debtor applied to take the benefit of the Insolvent Act, and one of his creditors, by threats of opposition, obtained from him promissory notes for the amount of his debt, and the creditor afterwards indorsed one of them to a bonâ fide *holder for a valuable consideration, without notice of the circumstances under which it had been obtained, and the debtor was afterwards arrested on the bill, and he gave a bail bond, the Court directed the bail bond to be delivered up to be cancelled on filing common bail.*

Follett showed cause why a bail bond should not be delivered up to be cancelled on filing common bail, and why a Mr. *King* should not deliver up certain notes drawn by the defendant in his favour. The facts of the case, as they appeared in the affidavit of the party making the application, were these:—The defendant, some time ago, became indebted to Mr. *King*, who is an attorney, in a considerable sum, for work and labour as an attorney, and also for money lent. The defendant having been arrested, he determined to take the benefit of the Insolvent Act, and for that purpose gave the necessary notices. Mr. *King* intimated that he intended to oppose the defendant's discharge. In order to induce Mr. *King* not to oppose him, the defendant gave him several promissory notes for the debt due from the defendant to him, and which the former had introduced into his schedule. The plaintiff did not oppose him, and the defendant was discharged. On one of the promissory notes which had been so given by the defendant to *King* while in prison, the defendant was now in custody at the suit of the plaintiff, to whom *King* had indorsed it without notice, and for a valuable consideration. He submitted, that as this note was not in the schedule of the defendant, he was not discharged from it by the Insolvent Act, 7 Geo. 4. c. 57. § 60. The words of that section are, "That no person, who shall have become entitled to the benefit of this act, by any such adjudication as aforesaid, shall at any time thereafter be imprisoned by reason of the judgment as aforesaid entered up against him or her according to this act, or for or by reason of any debt or sum of money, or costs, with respect to which such person shall have become entitled." The question for the determination of the Court, therefore, was, what meaning ought to be attached to the word "debt." The debt here between the plaintiff and the defendant, and which the plaintiff sought to recover, was the promissory note, and not the debt for which the defendant had been imprisoned under the Insolvent Act. From the debt on the note, the defendant could not have been discharged under the Insolvent Act, because at the time of making out his schedule the note was not in existence. In the case of *Simpson* v. *Pogson and wife*, 3 D. & R. 567., the creditor of an insolvent who petitioned to be discharged under the Insolvent Act, obtained from his debtor, while in prison, a bill of exchange for his debt, and indorsed it to an innocent holder for a valuable consideration. It was there holden, that although this might be a fraudulent preference of the creditor, the insolvent's discharge was no bar to an action upon the bill by the innocent indorsee. Here the plaintiff was an innocent holder of the note, and therefore was entitled to proceed upon it.

Kelly, in support of the rule. By the express words of the Insolvent Debtors Act, the defendant cannot be kept in custody "for or by reason of any debt" "in respect" of which he has been discharged. The question here is, not whether he shall be discharged from the debt altogether, but whether he shall be kept in custody for it. At the time the schedule was filed, the note was not in existence. But the debt, for a part of which it was given as security, was, and was stated in the schedule. Under the threat of opposition the defendant gave four promissory notes for the amount of the debt; and the plaintiff, knowing they would be void in his hands, paid one of them away, and the present action was brought upon it. Now, supposing it had been a warrant of attorney, there is a clear authority to show that it would have been void. In the case of *Jackson* v. *Davison*, 4 B. & Ald. 691., where a debtor having petitioned the Insolvent Court to be discharged under the act, a creditor gave notice of his intention to oppose him, on the ground that the debt was fraudulently contracted. To induce the latter to withdraw his opposition, the insolvent agreed to execute, within three days after his discharge, a warrant of attorney for the debt, and in the mean time to give a promissory note of a third person for the amount, which was to be delivered up on the execution of the warrant of attorney. The insolvent was discharged, and the warrant of attorney was executed on the delivery up of the note. The Court set aside the warrant of attorney, and the judgment entered up thereon, on the ground that the agreement on which they were founded was contrary to the policy of the Insolvent Act, inasmuch as it enabled the creditor to take to himself a large portion of the future effects, which the legisla-

ture intended to be distributed amongst all the creditors. In that case three of the Judges commented very strongly on the conduct of one creditor thus effecting a fraud upon the others. Mr. Justice *Bayley* observes, "It is part of the policy of the Insolvent Debtors Act, that the property of the debtor shall be divided rateably among his creditors. Now, if this warrant of attorney were to stand as a valid security, it might operate in fraud of the general body of creditors, by enabling the present plaintiff to take from them a large portion of the future effects of the debtor, which the legislature manifestly intended to be distributed among all the creditors. Now, it has been holden in the case of a composition deed, that if one of the creditors before executing the deed, obtain from the insolvent a security for the residue of his demand, by refusing to execute, until such security be given, that security is void in law, because it is a fraud upon the rest of the creditors.* So, too, by the express provisions of the bankrupt laws, any security given to a creditor as a consideration, to persuade him to sign a certificate, is void. Now, it was manifestly the intention of the legislature, by this act of parliament, to secure a portion of the future effects of the debtors for the benefit of those creditors whose names are inserted in the schedule." This is a clear authority to show that the Court would not permit the other creditors to be defrauded by the threat of the creditor to whom the warrant of attorney was given, although the circumstances of that case were not so strong as those of the present. The question is, therefore, whether the Court will not carry into effect the same rule with respect to promissory notes. Then as to the delivery up of these notes by *King*. Between *King* and the defendant, it being a fraud on the creditors, the former could not recover upon them. And the question is, whether, this attorney having obtained possession of these notes under such aggravated circumstances, the Court will not interfere, and make him deliver them up. He has treated them as part of the original debt, in fraud of the other creditors; and part of that debt being for business done as an attorney, I should hope that the Court will interfere to make him deliver up those notes. On an application to make an attorney pay costs, under the 43 Geo. 3. c. 46., the Court said, that in other cases it had no jurisdiction, but that, in the case of an attorney, they had an authority to make him pay them, and therefore they made the rule absolute for that purpose. We might, it is true, have a remedy in equity, but before we could obtain its assistance, *Mr. King* might pay away all these notes for a valuable consideration. Then, again, as to the first point, whether the Court will discharge this defendant out of custody, on the ground of his having been relieved from the debt under the Insolvent Act. The case in Dowling and Ryland, I do not dispute. The plaintiff, in this case, may perhaps have a good cause of action on this note against the present defendant. And if it appears that he took the note without knowledge, he may recover. But whatever may be the defence at the trial, this being a note given for a debt inserted in the schedule, from which debt he has been discharged under this act, he is now "imprisoned by reason" of that debt, and consequently entitled to have the bail bond delivered up. In the case of *Wilson and another* v. *Kemp*, 3 Maul. and Sel. 595., it was holden, that there was no distinction between the *bonâ fide* holder, and the original party, as to the discharge of the defendant. The language of the statute of the 54 Geo. 3. c. 28., under which the application was there made, is somewhat different from that of the 7 Geo. 4. c. 57. The words of the former statute are, "by reason of any debt contracted, incurred, occasioned, owing, borrowing, due." I quote this case to show, first, that the Court will put a liberal construction on the statute in favour of liberty; and secondly, that it is not necessary the debt for which he has been arrested should be the same as that from which he was discharged under the Insolvent Act, but merely that it should be a debt by reason of the one from which he was so discharged. The language of Lord *Ellenborough* is this: "The word 'occasioned' is of very large import, including both the consideration and the promise. We think, therefore, in furtherance of the clear object of the act of parliament, the defendant should not be held to bail on this promise, although it may be the foundation of an action." I submit that there is no difference between the words "by reason of any debt," and "occasioned by any debt." The object of the legislature was, that a party should not be imprisoned by or on account of the debt from which he had been discharged.

Patteson J. You are driven to argue, that this debt is virtually stated in the schedule. But the bill is not stated in the schedule.

Kelly. It could not be, because it was not then in existence. The ground on which I put the case is this,—that if the party is arrested here, he is arrested by reason of a debt from which he was discharged.

Patteson J. He is arrested for a debt on this particular promissory note. There is no privity between the parties, as in the case of a bill of exchange. The act of this attorney cannot be a defence to the action.

Kelly. It is no discharge of this debt, if the plaintiff be a *bonâ fide* holder, without knowledge. But though it is no defence at the trial, yet the Court has always discharged a defendant under such circumstances out of custody. I have not produced a case; but it is the constant practice of the Court.

Patteson J. But there, you see, the bill has been scheduled.

Kelly. The ground of your Lordship's difficulty appears to be, that this is not a debt from which the defendant has been discharged by the Insolvent Debtors Act. That may be. But it is enough for me to show that he was discharged from the debt which gave rise to this debt. It seems to me exactly the case of a doubtful question, as to whether the holder of a bill of ex-

* *Cockshott* v. *Bennett*, 2 T. R. 763. *Jackson* v. *Lomas*, 4 T. R. 166. *Jackson* v. *Duchaire*, 3 T. R. 551. *Leicester* v. *Rose*, 4 East, 372.

change had notice. In the case of *Sammon* v. *Miller*, 2 Bar. & Cress. 770., the side note is this:—"In Jan. 1819, *A.* had been discharged under the then Insolvent Debtors Act, 53 Geo. 3. c. 102. In the schedule, *B.* was described to be a creditor in respect of 2000*l.* five per cent. Navy Bank annuities lent by *B.* to the defendant; and to secure the replacing of the stock on the 9th of October, 1820, and the payment of the dividends in the mean time, *B.* held *A.*'s bond, and a warrant of attorney, upon which judgment had been entered up. *B.* afterwards held *A.* to bail upon the judgment. Holden, that *A.* was entitled to be discharged, on filing common bail, under the 29th section of 53 Geo. 3. c. 102., which enacted, 'That no prisoner, who shall have obtained his discharge, shall be imprisoned by reason of any judgment or decree, obtained for payment of money, or for any debt incurred, and with respect to which such discharge shall have been obtained.'" There is also the case of *Gordon* v. *Wood*, which took place in *Hilary* term of the last year. There, a person moved that a bail bond should be delivered up to be cancelled, on the ground of his having been discharged, under the Insolvent Debtors Act, from the debt for which he had been arrested. In answer to the application, the plaintiff made an affidavit that he was unacquainted with the fact. The Court said that would be a proper question for the trial. It would be a defence, if he had notice. But the Court said, that at all events, this being a matter which was in fact the question to be tried in the cause, they made the rule absolute for giving up the bail bond to be cancelled. On the authority of these cases, and the language of the act of parliament, I submit, that the bail-bond in this case ought to be delivered up to be cancelled on filing common bail.

Cur. adv. vult.

Patteson J. This was an application to show cause, why the bail bond should not be delivered up to be cancelled on filing common bail, and why Mr. *King*, an attorney, should not deliver up certain promissory notes now in his possession. It appears, that in this case the defendant was indebted to *King* some time before he went to prison, and took the benefit of the Insolvent Act. The debt consisted partly of money lent, and partly of work and labour done as an attorney. It then appears that *King* was about to oppose him, under the Insolvent Act. Then, to induce him to withdraw his opposition, certain promissory notes were given by the defendant to *King*, for the debt. But they did not distinguish the claims for which these notes were given. Now, it is quite clear that these notes could not have been inserted in the schedule, because the schedule was at that time given in by the defendant. But the consideration for these notes was inserted in the schedule, namely, the debt, consisting of work and labour, and money lent. It is quite clear that these notes would be void in the hands of *King*. They would also be void in the hands of those who took them with knowledge. But it is said that the present plaintiff is an innocent holder. The question, whether the plaintiff has a right to recover, is a question for the jury. It depends upon the fact, whether or not he is an innocent *bonâ fide* indorsee. But the act of parliament says, "that no person, who shall have become entitled to the benefit of this act," "shall at any time hereafter be imprisoned," "by reason of any debt, or sum of money, or costs, with respect to which such person shall have become so entitled."

Now, in order to see in respect of what debts the defendant would be entitled to his discharge, we must have recourse to sect. 46. By that section he is entitled to his discharge "as to the several debts and sums of money due, or claimed to be due, at the time of filing such prisoner's petition, from such prisoner to the several persons named in his or her schedule as creditors, or claiming to be creditors, for the same respectively." It is quite clear, therefore, that this defendant was entitled to the benefit of this act with respect to the debt in consideration of which the present notes were given. He must therefore be said to have been arrested by reason of a debt in respect of which he was entitled to his discharge under the Insolvent Act. On the authority, therefore, of the case stated by Mr. *Kelly*, and as the debt in respect of which the note was given, was one upon which the defendant was entitled to his discharge under the Insolvent Act, I think this is such a case as calls on me to direct the bail bond to be delivered up to be cancelled on filing common bail. That does not prevent the plaintiff from recovering, if he goes before a jury. With respect to the other part of the application, which requires that Mr. *King* shall deliver up the promissory notes still in his possession, it is said that *King* may indorse them over to *bonâ fide* holders, and thus render the defendant liable upon them; and that might be done pending an application to a Court of equity; and it is said that *King* is an attorney of the Court, and therefore we can interfere; though if he were not, we should have no jurisdiction so to do. This is not, however, like the case of a warrant of attorney. We may interfere to set that aside on equitable grounds. But the mere question here is, whether the circumstance of *King* being an attorney authorises us to interfere. If this had been done in his capacity of attorney, we could have interfered; but it was not done in his capacity of an attorney, but as a creditor. I feel, therefore, that I am bound to discharge the latter part of the rule, as to giving up these notes. But as they were taken at a time when *Masters* was in custody, on the ground of his discharge not being opposed, that part of the rule requiring the bail bond to be delivered up to be cancelled must be made absolute, though without costs, as it does not appear that the plaintiff had any knowledge of the circumstances under which the note he holds was obtained.

Rule absolute for the delivering up of the bail bond to be cancelled; and discharged for the delivering up of the notes by *King*.—*Kay* v. *Masters*. T. T. June 13. 1831.

OLD WARRANT OF ATTORNEY.—AFFIDAVIT.

The date of an affidavit may be used, to explain the time at which it alleges a particular event to have taken place.

Halcomb moved to enter up judgment on an old warrant of attorney. The affidavit of the

party being alive within the term, was in these words, "that he verily believes he is alive, for he saw him about three days since." The date of the affidavit was the 6th of June.

Patteson J. That will do. The party was clearly alive during the term, if we look to the date of the affidavit.

Rule absolute. — *Anonymous.* T. T. June 11. 1831.

MINOR CORRESPONDENCE.

COGNOVITS.

SIR,

You are aware that it is not irregular to take *cognovits* before declaration; but yet, on signing judgment on the *cognovit*, the clerk of the judgment requires the *draft declaration* to be produced. The object of saving the expense of a declaration by giving a *cognovit*, is therefore frustrated. Surely this might easily be altered. R.

PARTICULARS OF DEMAND.

Allow me, through the medium of the Legal Observer, to express my hope, that at a time when so many and so great improvements are being made in the law, the practice with reference to particulars of demand will not be passed over unheeded. The late new rules of Court certainly compel the plaintiff to deliver particulars of his demand at the same time with the declaration; but there is no means by which the defendant may compel the delivery of them before that time; for in a case reported in 7 Dow. & Ry. 125., where the plaintiff refused to deliver particulars in obedience to a Judge's order, the Court of King's Bench would not allow the defendant to sign judgment of *non pros*: thus, a defendant is obliged to wait until the expense of a declaration has been incurred, before he can know with certainty what it is that the plaintiff seeks to recover of him; and therefore he has no opportunity to settle the action, or to pay any sum of money into Court, and save himself from any further costs. It may, perhaps, be said, that he can obtain an order for a stay of proceedings until they are delivered; but you will perceive that the plaintiff may deliver the particulars of demand at the same time as the declaration, and thus the order will be rendered nugatory. W. S.

*** Our Correspondent will observe, by the Third Report of the Common Law Commissioners (printed in an *Appendix* to the Legal Observer), that this evil is provided for.

ANSWERS TO QUERIES.

TRANSFER OF MORTGAGE. PP. 224. 350.

Your Correspondent, H. H., has not met the question. It is, whether the circumstance of the mortgagor joining in the transfer of a mortgage *with a new clause of redemption*, does not create a *new debt*, and consequently render the instrument a transfer of the estate merely, and not of a mortgage; and *that*, notwithstanding the deed contains an assignment of the old mortgage debt.

Such I conceive to be the case. The doubt has frequently occurred in practice; and to obviate it, an *ad valorem* duty on the whole amount of the mortgage debt has been affixed. G.

PRACTICE. — DISCHARGING MORTGAGE. P. 351.

H. B. A. is right in denominating the demand of a quarter's interest *a fine*. The more usual practice is, I believe, to demand six months' interest. There is, I believe, no decision on the point, unless very recently; but it appears to me clear, on principle, that the usury laws cannot apply. There is no stipulation to this effect in the original contract. The money is not demanded for the use or forbearance of money; and the adoption of three or six months' interest, as a measure of the fine or premium demanded by the mortgagee for foregoing a right which the law confers on him, cannot render the sum so paid interest. G.

MORTGAGE. — POWER. PP. 225. 349.

I agree with H. H., that the power to sell the fee, sometimes added to a mortgage by demise, is not a good power at law. How far equity would enforce a sale, and the concurrence of the mortgagor in the conveyance of the fee to a purchaser, is another matter. I conceive that it would act on such an agreement, and that the mortgagee would be entitled to a decree for a sale, instead of a decree for a foreclosure only. Had the conveyance been to the mortgagee and his heirs, to the use of the mortgagee, his executors, &c. for a term of years, subject to redemption, and with a power to sell the fee, such a power would be good under the statute. So, if the mortgagor's estate had been conveyed to him, to the usual uses to prevent dower; for here the demise by him would operate as an appointment of use. G.

SUB-LEASE. PP. 271. 379.

Such a tenant is, properly speaking, neither tenant at will, nor tenant from year to year. He is tenant at sufferance, and may be ejected without any notice. Acceptance of rent from him would make him tenant from year to year "*on the terms of the old lease.*" G.

DEVISE. — ISSUE. P. 350.

1. I should consider *C. D.* would take an estate in fee simple at the death of *A. B.*, as *C. D.* takes the fee by way of executory devise; and which vests in him on the happening of some future contingency, namely, the surviving *A. B.* (2 Blac. Com.) I do not see any necessity for a fine to pass the estate of *C. D.* to a purchaser, except he be married; then it will be necessary, in order to bar dower. T. E.

2. *C. D.* clearly takes an estate tail. Perhaps *Doe* d. *Wright* v. *Jesson*, 2 Bligh's Parl. Cas. p. 1., is the best case to which to refer your Correspondent, on account of the decisions there cited. G.

WILL. — VESTED INTEREST. — POWER. P. 350.

1. It was evidently the intention of the testator, that *R. L.* should take an estate in *special tail;* and the words of the will will not, in fact, admit of any other construction. (Watkins's Prin. of Convey.) *R. L.* certainly cannot dispose of the estate as he likes, but must abide by the words of the will. The children, I apprehend, would take the fee as tenants in common.

T. E.

2. On the authority of *Doe* v. *Jesson*, 2 Bligh's Parl. Cas. p. 1., I consider that *R. L.* would take an estate tail. G.

NEW RULES. — LENGTH OF DECLARATION. P. 368.

In answer to the query of *W. H.*, I certainly think it will be necessary, according to the schedule of the forms of declarations, to put the usual commencement to the declaration, and the conclusion thus, "to the plaintiff's damage of forty pounds; and thereupon he brings suit," &c. (*Mr. Chapman's Practice*, p. 163. and 67.)

T. E.

QUERIES.

HOUSEHOLD FURNITURE.

A., by his will, directed his household goods to be sold, except such part of them as his wife might wish to reserve to herself, provided she went into housekeeping. Under the words "household goods," can his widow retain the plate, linen, china, musical instruments, watches, and trinkets belonging to the deceased, which were in the house at the time of his death? Or does the term "household goods" imply only household furniture; such as beds, bedsteads, tables, chairs, and the like? H. B. A.

ARTICLED CLERK.

A., an infant, was articled to *B.*, an attorney, for five years. *A.* boarded with his father. At the expiration of three years, the father of *A.* died. Is *B.* bound to find *A.* with board and clothes for the remainder of the term? No mention whatever was made in the articles of clerkship respecting board or lodging, &c.

H. B. A.

NEW TRIAL. — COSTS.

In an action where a verdict has been given for the defendant, but a rule for a new trial is afterwards obtained on payment of all costs by the plaintiff, is the defendant liable to pay any costs to the plaintiff, if he pays the whole amount of the plaintiff's demand into Court immediately subsequent to the rule for new trial being obtained? W. S.

MISCELLANEA.

LORD MANSFIELD.

It is almost proverbial, that a lawyer never does any thing well, for which he is not feed. Lord Mansfield told a story of himself, — that feeling this influence, he once, when about to attend to some professional business of his own, took several guineas out of his purse, and put them in his waistcoat pocket, as a fee for his labour. — *Sugden's Letters*, p. 105.

COMMONS, &c. IN THE TEMPLE.

Till there was a relaxation of discipline, the commons were continued in the vacation, as well as in the terms, and the members obliged to attend, upon severe penalties for neglect of it. The Barristers, though they were called to their degree, were not admitted to practise, but by special leave from the Judges, till three years after their call; during which time, attendance to commons, both in term and vacation, was not to be compounded for, or dispensed with. — *Pegge's Curialia*, 324.

BENCHERS.

The Benchers are generally in number about twenty, though there is no fixed number. They may be called to the Bench at eighteen or twenty years' standing. The Bench have power to call whom they think proper of such standing to the Bench, which if they answer not, they pay a fine of 50*l.* The Benchers sat at their own expense in the Society, having nothing allowed but their commons, which few, I believe none, of the Benchers of the other houses do. — *Ibid.* 325.

READINGS.

The readings, which generally were upon some statute, continued about eight days, when there were treats and balls at the reader's expense; and there is an order of the House, of no very old date, by which the Reader was restrained from having above eight servants, which shows in some measure the luxury and expense attending them. They have now been discontinued upwards of seventy years, (the last Reader being Sir William Whitlocke, 1684;) but there is a Reader still appointed every year, and some small treat at the expense of the Society, of venison, &c.; and the arms of the Reader are put up in a panel of the hall. — *Ibid.* 326.

The Legal Observer.

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> ——— "Quod magis ad nos
> Pertinet, et nescire malum est, agitamus."
>
> HORAT.

CHANCERY REFORM, AND THE BILL FOR THE BETTER ADMINISTRATION OF JUSTICE IN THE COURT OF CHANCERY.

THE important cause of Chancery Reform has hitherto made but little progress. It is not a little remarkable, that, although for the last 250 years the complaints against the present system have been continual and unvaried, the Court of Chancery and its machinery, with the exception of the appointment of the Vice-Chancellor, has remained nearly the same in every particular. It is obvious, therefore, that in spite of these complaints so unsparingly uttered, the supposed evils which occasioned them cannot, after all, have been very enormous, or they would not have been thus endured. But it also follows, that if this feeling against the Court has existed so long, it must have some just cause, and that it is highly important that the real abuses should be remedied. If, however, caution and deliberation were ever necessary, they are called for most peculiarly in any attempt at altering a system so involved and complicated as the present Courts of equity. The march of reform must here evidently proceed step by step; and it must be seen that the first is made securely, before it is followed by a second.

With these feelings, we have looked forward with some degree of *nervousness* to the introduction of the Chancery bill by the Lord Chancellor. His bankruptcy act appears to us so questionable a measure,—his other plans have shown so little care and deliberation,—that we could not but think it perilous to take him as our guide in this difficult and dangerous enquiry. We have now received his bill, which we propose to lay before our readers, with some few accompanying remarks.

And, first, let us see in what manner it was introduced by the noble and learned Lord. The Lord Chancellor, after stating that the great bulk of the expense of a suit in Chancery arises from the proceedings in the Masters' Office, mentioned that he had drawn up a plan for the remedy of this evil, and submitted it to the most eminent practitioners of the Courts of equity; and expressed his anxiety — which we were glad to hear — that his plan should be rather too limited than too extensive or rash in its amendments. He then proposed that the Masters should hereafter sit during the day, and in the evening prepare their reports; and that then they should sit in public in Courts, three in each, to hear and dispose of the objections to the reports: that the parties should still have the opportunity of taking exceptions to the reports so made by the three Masters, and of having them heard by the Lord Chancellor, the Vice Chancellor, or the Master of the Rolls, as at present. He further proposed, that the Masters should be paid by fixed salaries, and not by fees; some part, however, of their emoluments still to consist of fees, in order to quicken their diligence.

The other great change is the substitution of *vivâ voce* evidence for written interrogatories. This is to be taken by the Masters; and the Chancellor stated, that if benefit resulted from this plan, the next step might be to have the evidence taken by the same Judge as tried the cause.

Now, we are not inclined to object to any part of this reform. The Chancellor has here evidently taken the opinion and guidance of those best acquainted with the practical working of the present system. The proposal for the Court of the three Masters * has our unqualified appro-

* We understand that this part of the plan originated with a solicitor of eminence.

bation. We think it an alteration likely to be attended with much benefit; and of the plan for taking evidence *vivâ voce*, we long ago expressed our favourable opinion. Our readers will find some other points of minor interest in the bill, which we shall now proceed to analyse, directing particular attention to the clauses relating to *copies*, and to the conveyancing Master.

It is entitled, "An Act for rendering the Administration of Justice in the Court of Chancery more expeditious and more certain;" and enacts,—

As to the Masters' Court.

1. That from and after the passing of this act, the Masters of the Court of Chancery, other than and except the Master of the Rolls and the Accountant-General, shall hold sittings in Courts of three each, in such rotation as shall be settled by any orders to be made from time to time by the Lord Chancellor, Lord Keeper, or Lords Commissioners for the Custody of the Great Seal, so as three shall always be sitting during some part of each day in one or two such Courts, as the state of the business may require, at such times of the day or the evening as may be directed by the Lord Chancellor.

2. That all objections to any report of any Master, made by any party, shall be reduced into writing, and a copy thereof served upon the other party, and a copy delivered to the Master, and a copy to each of the other two Masters of the Court in which the said Master shall be sitting; and the matter of the said objections shall be heard before the said Court in its turn, that is to say, according to the order in which it is set down in the paper of the said Court, subject, nevertheless, to such alteration or arrangement as the said Court may from time to time make in the said paper; and the said Court shall determine the said matter, by either allowing or overruling the said objections, in whole or in part, after hearing the parties by their *counsel or attorneys* in open Court.

3. That after the said Court shall have determined on the matter of the objections, the report shall be made according to such determination, and may be excepted against before the Lord Chancellor, the Master of the Rolls, or the Vice Chancellor, in like manner as the reports of Masters may now be excepted against; and the matter of such exception shall be heard and determined as is now done in that behalf; and the said report shall either be confirmed, or disallowed, or altered, as is now done; and if disallowed or altered, it shall be sent back to the Master, as is now done in the like case.

4. That the first clerk of any Master whose report is objected to shall attend and officiate as clerk of the said Court of three Masters, when the matter of such objection is heard and determined by the said Court.

As to Examination of Witnesses in London.

5. That from and after the passing of this act when any cause is at issue upon bill and answer, or replication or rejoinder, or requisition, or witnesses upon the matters in dispute, he shall give fourteen days' notice to the other party or parties, within one month after the said answer, replication, or requisition, has been filed, and shall lodge a copy of the said notice with the Master to whom the said cause stands referred; or in case it stands referred to no Master, then with the Registrar of the Court, who shall forthwith lodge it with one of the Masters in rotation; and such notice shall contain the names of the witnesses whom the party proposes to examine; upon receiving which notice the Master shall set the cause down for examination of witnesses, appointing the day for such examination not less than one week after receipt of the notice; and each party to whom such notice shall have been given, shall in like manner, within one week after receiving the same, serve the other parties with a list of the witnesses whom he proposes to examine, and give a copy of such notice to the Master or Registrar, as herein-before is provided; and on the day appointed for proceeding with such examination, the said Master shall first hear the parties by their *counsel or solicitors*, shortly stating the principal matters of fact in dispute; and each party, by his counsel or solicitor, shall examine his witnesses, beginning with the plaintiff or plaintiffs, and then the defendant or defendants, in the order in which such plaintiffs or defendants, if more than one, are named in the pleadings; and each witness examined for any party may be cross-examined by all the other parties, and re-examined by the party producing him; and all the examinations shall be taken down in writing by the clerk or clerks of the said Master, and signed by the said Master at the end of each folio; and copies of such examinations shall be given to the parties, if they require the same, such copies to be signed by the first clerks of the said Masters; and the copy signed by the Master shall be filed in the office with the pleadings in the cause.

6. That no witness shall be examined by any party, other than and except such whereof he hath given notice, as herein-before is provided, save and except when leave shall be given by such Master, upon application to be made to the said Master, with affidavit of the special circumstances whereon such application proceeds.

7. That from and after the passing of this act, all examinations of witnesses upon interrogatories, before the examiner or otherwise, shall utterly cease and determine; and all things which the parties in any cause, or the Court, or the officers thereof, may by law and the practice of the said Court now do with, upon, or touching depositions taken upon interrogatory, shall and may be done with, upon, and touching depositions to be taken by examination of witnesses before the said Master.

8. That nothing herein contained shall extend to alter the manner of taking depositions in country causes, save and except such as is next herein-after enacted.

As to the Examination of Witnesses in Country Causes.

9. That in all country causes, where all the parties are agreed to examine their witnesses before one of the Masters of the Court, the ex-

vided, before one of other of the said Masters; and in case the parties shall not all be so agreed, then the examination shall be had before one of the *barristers or solicitors* to be appointed as country commissioners of bankrupt, under the powers of an act passed in the first and second years of his present Majesty's reign, intituled "An Act to establish a Court in Bankruptcy;" such barrister or solicitor to be named by the parties, if they can agree; and if not, by the Master to whom the cause stands referred, or by the Registrar, in case there be no such Master; and the proceeding shall be before and by and concerning such barrister or solicitor, as regards notices, examination of witnesses, signatures, appointments, enlargements, and leave to examine more witnesses, and otherwise howsoever, in like manner as by, before, and concerning the Master of the Court, under the foregoing provisions of this act.

Masters' Fees and Salary.

10. That from henceforth no fees, gratuities, nor any emoluments whatever, shall be taken by any Master, except such as are set forth in the new schedule hereunto annexed, under penalty of forfeiting 500*l.* for every fee, or gratuity, or emolument, so taken, and being declared incapable of ever again serving in any office under his Majesty, his heirs and successors.

11. That from henceforth all the fees to be taken, as specified in Schedule (B.) to this act annexed, shall be paid into the hands of the Accountant-General of the Court of Chancery; to be by him carried to the account of the Dead Fund, on pain of forfeiting 500*l.* for every fee not so paid in within one month after receiving the same, and to be declared incapable of serving his Majesty, his heirs and successors, in any office or situation.

12. That no party shall from henceforth be obliged to take any copy of any writing by any Master, or the clerk of any Master, on pain of 100*l.* penalty, and being declared incapable as aforesaid; and if any Master, or the clerk of any Master, shall refuse to perform what by his duty he is required to perform towards such party, because of his having refused to take such copy, such Master or clerk shall, on conviction thereof, be fined the sum of 500*l.*, and be declared incapable as aforesaid.

13. That from and after the passing of this act, the said Masters shall receive for their whole salary and emoluments the sum of 3000*l.* each by the year, in four quarterly payments, out of the said fund (Dead Fund).

Clerks' Fees and Salaries.

14. That the first clerk of each Master shall receive, besides the fees in Schedule (A.), the sum of 500*l.*, and the second clerk the sum of 300*l.*, and no more, to be paid out of the said fund by four quarterly payments.

Conveyancing Master.

15. That it shall and may be lawful for the Lord Chancellor, to appoint a Master, to be called the Conveyancing Master, in addition to the Masters now belonging to the said Court; and all questions touching the goodness of any title, or other questions of title, shall be referred to such conveyancing Master, either by the Lord Chancellor, Master of the Rolls, or Vice Chancellor, or by the other Masters in whose offices such questions shall from time to time arise, which conveyancing Master shall report thereupon to the Court, or to the Master from whom the said reference shall have come to him; and such conveyancing Master shall have all the powers in examining such matters which the present Masters now have in that behalf.

Monthly Return of Proceedings.

16. That as often as any cause or any matter is referred to any Master, he shall from time to time give notice to the Registrar of the Court, and not less than once in a month, of the steps taken in the same, and the state in which the same is; and it shall and may be lawful for the Judge of the Court by which such reference was made, to give directions for expediting the said cause or matter.

CHANGES IN THE LAW EFFECTED DURING THE LAST SESSION.

No. III.

EXAMINATION OF WITNESSES ON INTERROGATORIES.*

BEFORE the passing of the above act, constant injustice was wrought both to plaintiffs and defendants, where their witnesses were sick or abroad, from the Courts being unable, in general, to direct their examination on interrogatories or otherwise, without the consent of the opposite party. The only means they could adopt was that of putting off the trial, if the opposite party refused his consent. This, however, could only operate beneficially in the case of a defendant being desirous of examining witnesses on interrogatories. The deferring the remedy of the plaintiff by putting off the trial, might induce him to consent. But where the plaintiff wished to examine on interrogatories, and the defendant withheld his consent, to put off the trial was to benefit him, as it only insured the delay of the plaintiff's remedy. There was, however, one exception. Where causes of actiona rose in *India*, by the 13 Geo. 3. c. 63. § 45., the Courts had such a power. The strict words of that statute only applied to the case of plaintiffs' demands; but as defendants were clearly within the equity and intention of it, the Court of Common Pleas gave them the same power.† The first section of the new act extends the

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* For the act 1 W. 4. c. 22., at length, see the Monthly Record for April.

† *Grillard* v. *Hogue*, 1 Brod. & Bing. 519.

provisions of the *India* act "to all colonies, islands, plantations, and places under the dominion of his Majesty in foreign parts, and to the Judges of the several Courts therein, and to all actions depending in any of his Majesty's Courts of law at *Westminster*, in what place or country soever the cause of action may have arisen, and whether the same may have arisen within the jurisdiction of the Court, to the Judges whereof the writ or commission may be directed, or elsewhere." The powers given to the Courts by this section, as to witnesses in the colonies, are much greater than they were as to witnesses in *India*. For, unless the cause of action arose in *India*, the commission under the 13 Geo. 3. c. 63. could not issue. Now, whether the cause of action arises in the colony where the witness resides or not, he may be examined under the commission. A doubt, however, may be entertained, whether a commission can be issued at all, without consent, where the cause of action arises *out of India*, and the witness resides *in India*. For, as the cause of action arose out of *India*, it cannot issue under the *India* act; and as the witness resides in *India*, it cannot issue under the present act, because it applies to cases where the witness resides in other foreign dominions of his Majesty.

The second section gives power to the Judge of the Court to which the commission is issued, to compel the attendance of witnesses.

By the third section, the costs of executing the commission are to be in the discretion of the Court. Previous to this, the successful party was forced to pay the costs of examining witnesses on interrogatories, or taking office copies of depositions.* The Court might, however, if it thought right, make the costs depend on the event of the cause.†

The fourth section is the most general and efficient of those contained in the act. It empowers the Courts at *Westminster*, Common Pleas of *Lancaster*, Pleas of *Durham*, "upon the application of any of the parties to such suit, to order the examination on oath, upon interrogatories or otherwise, of any witness within the jurisdiction of the Court;" "or to order a commission to issue for the examination of witnesses on oath at any place or places out of such jurisdiction, by interrogatories or otherwise." In acting on this section, as well as the former, it will be necessary to keep in view sect. 10.; for by the latter, the depositions taken by virtue of this act cannot be read, "unless it shall appear to the satisfaction of the Judge, that the examinant or deponent is beyond the jurisdiction of the Court, or dead, or unable, from permanent sickness or other permanent infirmity, to attend the trial." This restriction may of course be removed by the consent of the opposite party. With respect to the practice on examinations under this act, it is to be observed, that the Courts require the name of the person, before whom the examination is to take place, to be mentioned in the application for that purpose. When it was necessary to obtain the consent of the opposite party to such an examination, it was of course requisite that the names of the witnesses proposed to be examined should be given on making the application, as a party could not be expected to consent to the examination on interrogatories of witnesses whose names he did not know. But now that consent is no longer required, it cannot be necessary to give their names, until a copy of the interrogatories in chief are delivered to the opposite attorney. He will be placed in no worse situation in consequence of this delay, as he could not draw his cross interrogatories until he had seen those in chief. Of course, he may always apply for further time to file cross interrogatories. The rule for such an examination is *nisi* in the first instance.‡ It is to be observed, that the fact of the opposite party filing cross interrogatories is not a consent to the reading of the answers to the interrogatories in chief, so as to remove the restriction contained in sect. 10. For the opposite party, by filing his cross interrogatories, only does so that he may not deprive himself of the advantage of cross-examination, in case it should appear at the trial that the examination may be read. Till then, both examination in chief, and cross-examination, are merely *de bene esse*.

By sect. 5., witnesses may be compelled to attend, and produce documents, under the same penalties, with the same remuneration, and the same privileges with respect to the production of documents, as in the case of a trial.

The sixth section empowers the removal by *habeas corpus* of witnesses in custody.

By the seventh section, persons are to

* *Stephens* v. *Crichton*, 2 East, 259.; Hull. on Costs, 2d ed. 439.; 2 Tid. Prac. 813. 9th ed.; *Taylor* v. *R. E. Insur. Company*, 8 East, 393.

† 2 Tid. Prac. 813. n. ed. 9.

‡ E. T. 1831, *per* Taunton J.; T. T. 1831, *per* Patteson J.

be examined on oath or affirmation. In case of wilful false statements, in material points, on such oath or affirmation, the party will be liable to the penalties of perjury, "and shall and may be indicted and prosecuted for such offence, in the county wherein such evidence shall be given, or in the county of *Middlesex* if the evidence be given out of *England*." The latter part of the clause seems somewhat unusual in the extent of the power it gives to the quarter sessions of the county of *Middlesex*, which have power to try indictments for perjury; as now, by the words of it, a foreigner may be punished for perjury committed in a foreign country. This is the direct meaning of the statute: how far the Courts will enforce this clause remains to be determined.

The eighth section authorises the persons before whom the examination takes place, to report as to "the conduct or absence of any witness or other person thereon or relating thereto," and the Court may take such steps on such report as it thinks proper.

In the ninth section a provision is contained as to costs of examinations taken under the fourth section. This differs in some degree from that contained in the third section, with respect to costs in cases under the first section.

In the third section it is directed, that the costs shall be in the discretion of the Court; but in the ninth section it is directed, that they "shall be costs in the cause, unless otherwise directed, either by the Judge making such rule or order, or by the Judge before whom the cause may be tried, or by the Court." In the former instance, no provision is made with respect to the costs, and therefore they would remain as before the statute, unless the Court should make some direction to the contrary; and in the latter they would be at once costs in the cause, unless the Court otherwise directed. It surely would have been better to allow the same rule as to costs to apply in both cases. There can be no reason for making any distinction.

We have already noticed the provision in the tenth section, restraining the use of the depositions or examinations in certain cases, at the time of the trial. At the end of the section it is provided, that "the examinations and depositions, certified under the hand of the commissioners, Master, prothonotary, or other person taking the same, shall and may, without proof of the signature to such certificate, be received and read in evidence, saving all just exceptions." This would seem to remove the necessity of proving the identity, as nothing is said about it, of the depositions. That necessity will of course remain in the case of depositions taken under the authority of the Court of Chancery. Previous to this act, where depositions were taken under a commission of a recent date, the commission must have been produced before they could be read in evidence. If they were of long standing, and the commission might therefore be presumed to have been lost, its production was not necessary.* It will henceforth be necessary to produce the commission in no case, except where the commission is to examine witnesses in *India*. An examined copy of depositions might have been admitted, though an office copy could not.† A copy of depositions, however, taken at a Judge's chambers, delivered out by his clerk, and signed by the Judge, was admissible at once, without any proof of an examination with the original.‡ It would appear by analogy, that an examined copy would be admitted in all cases of examinations taken under the authority of this act.

PRACTICAL POINTS OF GENERAL INTEREST.

No. XI.

WHAT ARE TENANTS' FIXTURES.

THE general rule of law is, that, whatever is annexed to the freehold by a tenant becomes part of it, and the act of removal is waste: *Cooke* v. *Humphrey*, Moo. 177., *Lord Darcy* v. *Askwith*, Hob. 234. The inclination of the Courts, however, of late years, has been to modify this rule in favour of the tenant, and he has been allowed to carry away many things, his right to which might formerly have been questioned. Thus, ornamental chimney-pieces, pier-glasses, hangings, and even wainscots, if fixed only by screws, have been expressly decided to be removable during the term. *Per* Lord Ellenborough, in *Elwes* v. *Maw*, 3 East, 52.; and see *Ex parte Quincy*, 1 Atk. 477. A varnish-house used for the purposes of trade, and which had a brick foundation let into the ground, has also been held removable. *Penton* v. *Ro-*

* *Bayley and another* v. *Wylie*, 6 Esp. 85.

† 2 Gilb. Ev. 21.; Bull. N.P. 229.; *Black* v. *Lord Braybrook*, 2 Stark. N. P. C. 13.; 1 Phil. Ev. 388. 396.; 2 Tid. Prac. 812. ed. 9.

‡ *Duncan* v. *Scott*, 1 Camp. 101.; 1 Phil. Ev. 388.

bart, 2 East, 88. But in the case of *Elwes* v. *Maw*, cit. sup., where the lessee of a farm had, at his own expense, erected a beast-house, fuel-house, pump-house, and fold-yard, the buildings being of brick and mortar, and tiled, with a foundation about a foot and a half deep in the ground, the lessee was not allowed, before the expiration of his term, to pull down the erections, dig up the foundations, and carry away the materials, leaving the premises in the same state as when he entered. This question has been discussed by the Court of Common Pleas in the recent case of *Grymes* v. *Boweron*, 4 Moo. & Pay. 143.

This was an action on the case, and brought against the defendant for an alleged injury to the plaintiff's reversionary interest in certain premises by the removal of a pump. At the trial before Baron *Garrow*, at the last assizes at Norwich, it appeared that the defendant occupied a cottage belonging to the plaintiff, as a yearly tenant, and that when the tenancy commenced, there was a well on the premises, from which the water was drawn by a bucket; that the defendant, for the more convenient use of the well, arched it over with brick, and erected a pump at his own expense, which was fastened or attached to a board or plank placed perpendicularly; the bottom of which rested on the ground, and the top was fastened to a wall about four inches distant by an iron bolt or pin, which had a head on the side of the board nearest the pump, and a nut and screw at the other end, on the opposite side of the wall through which the bolt passed. The tube of the pump passed through the brickwork into the well. The tenancy was determined by a regular notice to quit; and the defendant, on leaving the premises, removed the pump entire; in doing which a few of the bricks which covered the well were displaced, but the iron pin which attached the board to the well was left in the wall, the board only being taken away, and the well might have been used as it had been before the pump was erected. The learned Baron was of opinion that the pump was parcel of the freehold, as it could not have been made the subject of larceny at common law; and under his direction the jury found a verdict for the plaintiff, damages 4*l.*, leave being reserved to the defendant to move to set it aside and enter a nonsuit, in case the Court should be of opinion that he had a right to remove the pump. On the motion for a new trial, the opinions of the Judges were as follows: —

Lord Chief Justice *Tindal*. It is extremely difficult to draw a general, and at the same time to lay down any precise or accurate, rule on this subject. Each case must depend upon its own peculiar circumstances; and the nature of the article, as well as the object of setting it up, and the mode or degree of firmness with which it is affixed, must be taken into consideration. The pump, as described to have been fixed in this case, appears to me to fall within that class of fixtures which are removable as between landlord and tenant. More latitude has always been given, and a greater indulgence shown, to a tenant for years, than in a case between an heir and an executor, or the executors of tenant for life or in tail, and the remainder-man or reversioner. It has been decided, that a tenant for years may remove articles of ornament during the term, such as ornamental grates, stoves, marble chimney-pieces, pier glasses, wainscots fixed by screws, and the like. So coppers, ranges, ovens, and various other articles of that description, have, upon a change of occupiers, been usually allowed by landlords to be valued by the outgoing to the incoming tenant, or sold by the former; and in many cases the landlord himself becomes a purchaser. Looking, then, at this case; considering that the pump was an article of domestic convenience; that it was slightly affixed to the freehold, and removed without doing it any material injury; that it was erected by the tenant, and might be taken away entire; I think that as between landlord and tenant the latter had a right to remove it; and consequently that this verdict cannot be supported.

Mr. Justice *Park*. The rules with regard to property of this description vary according to the relation in which parties stand towards each other. In cases as between an heir at law and an executor, the rule obtains with the utmost rigour in favour of the inheritance. But the greatest latitude has always been shown, and indulgence given, to a tenant for years, who claims what are ordinarily called fixtures, as against his landlord. Although in the Year Book, 21 Hen. 7. 27., it appears that the rule in favour of tenants was narrowed, by only allowing a lessee for years to remove, within the term, things fixed to the ground, and not to the walls of the principal building; yet Lord *Hardwicke*, in *Lawton* v. *Lawton* (3 Atk. 15.), said, "what would have been held to be waste in Henry 7th's time, as removing wainscots fixed only by screws, and marble chimney-pieces, is allowed to be done. Coppers,

and all sorts of brewing vessels, cannot possibly be used without being as much fixed as fire engines; and in brewing-houses especially, pipes must be laid through the walls, and supported by walls; and yet, notwithstanding this, as they are laid for the convenience of trade, landlords will not be allowed to retain them." Perhaps, in a case of this description, we ought not to measure too nicely the mode in which the article is fixed, but we must look at the article itself. It appears that ovens, coppers, ranges, and other articles used for domestic purposes, have been held to be removable by a tenant, before or at the expiration of the term. This, therefore, makes the present case distinguishable from that of *Buckland* v. *Butterfield*, 4 J. B. Moo. S. C. 2 Brod. & B. 54., where the conservatory was not only deeply fixed in the soil, but in fact formed part of the dwelling-house to which it was attached. Here, however, the pump was not so fixed but that it might be removable by the defendant during his tenancy; and however much I regret it, as the article in dispute is of so trifling a value, I am compelled to say that I think the verdict was wrong.

Mr. Justice *Gaselee*. I certainly agree with my Lord Chief Justice and my brother Park, and hope, for the sake of both parties, that all further litigation between them may now be put an end to.

Mr. Justice *Bosanquet*. I am also of opinion, that the pump in question was removable by the defendant. In the case of landlord and tenant, the rule as to what articles shall be deemed fixtures has not been so strict as in the case of an heir and an executor, or the executor of a tenant for life, and the remainder-man; and the Courts have always inclined to favour a tenant for years. The only apprehension I have felt in this case was, that we might possibly lay down a principle which might infringe on the general rule, or add to the exceptions already made to it. But considering this is a case between landlord and tenant, and that the pump was erected by the latter for a domestic purpose, and removed by him entire, and without doing any material injury to the freehold, or the plaintiff's reversionary interest, I think we shall violate no principle of law*, by saying that under those circumstances the defendant had a right to remove it. The rule for setting aside the verdict must therefore be made absolute.

* See also on this subject *Thresher* v. *East London Waterworks Company*, 2 B. & C. 608.; *Davis* v. *Jones*, 2 B. & A. 165.; *Rex* v. *Inhabitants of Otley*, 1 B. & A. 161.

REVIEW.

A Summary of the Practice of the Courts of King's Bench and Common Pleas and Exchequer, as altered by the recent Acts and Rules; with an Appendix of the Acts and Rules, and new Forms. By Joseph Chitty, Esq., of the Middle Temple, Barrister at Law. London, S. Sweet; and Milliken and Son, Dublin. 1831.

Mr. Chitty is so well known in the profession as a writer on law in various branches, that our attention would not have been so readily attracted to the present work, did we not know that on such a subject his long experience ought to afford him great advantages. The size of the work, and the mode in which it is done, lead us to presume that it is the work of his *own* hands.

It is observed by the author, in his preface, "that more advantages are lost, and more difficulties, irregularities, and defeats are experienced, in an action or defence, with reference to *time*, than with regard to the *mode* of conducting a suit; and therefore it has been considered, that a compact statement of the full practice on this branch of the law might be useful." The principal object, therefore, of the work, is to give a succinct view of the *times* at which the various steps in a cause are to be taken. It is not to be supposed that any thing absolutely *new* on this subject can be adduced by Mr. Chitty, but the same facts with respect to time are brought much more clearly and readily to the eye of the practitioner. All the same facts may be found in Mr. Tidd's or Mr. Archbold's book, but they may be found much more easily in that of Mr. Chitty. The scope of it is not, however, confined to this object. It gives a short view of the proceedings in an action of ejectment; and in the course of the work, the changes effected in the practice by the acts of the two last sessions of parliament, and the new rules of *Trinity* term, are pointed out. The Appendix contains the new acts relating to the administration of justice, and the new rules of last Trinity term. To these are appended notes. Lastly, in the Appendix are introduced a variety of forms; some corrected according to the provisions and directions of the new acts and rules, and some entirely new.

ON THE THIRD REPORT OF THE COMMON LAW COMMISSIONERS.

IMMEDIATELY after the publication of this Report, we laid before our readers its sum and substance, with some remarks which we considered calculated to afford satisfaction to the profession.* We have already adverted to the numerous changes which have taken place since the commissioners made their First Report†; and we proceed to point out the other prominent alterations now proposed, and which have received the sanction of three of the original commissioners since elevated to the Bench. It appears that it was suggested by the Secretary of State for the home department, that it would be more convenient that the commissioners appointed under the first commission should proceed by themselves separately to finish any enquiry in hand relating to pleading and practice. Accordingly, the present Report has been made, signed by the four remaining members of the original commission, viz. Mr. Justice *Bosanquet*, Mr. Justice *Alderson*, Mr. Justice *Patteson*, and Mr. Serjeant *Stephen*.

On the former occasion we noticed numerous items of reduction in the payment of useless fees; and may now advert to others which will be equally advantageous to the suitor and the practitioner. Amongst these are the special jury fees. We recollect the time when a certain number of special jurymen made it their business to get nominated on almost all the trials of commercial causes in the city of London, and no doubt derived a handsome income for their diligence. Of late years this practice has declined, and it was certainly objectionable. A jury thus composed would in time become too much identified with the Court, and be apt to think, on most occasions, after the manner of the Judge who was accustomed to preside over them.

It is manifest that there could be no equality in rewarding a merchant with one guinea for each cause, whilst the tradesman was sent empty away. The value of time to the latter would generally be greater than to the former, and the loss of more serious consequence. As the common jurymen received no remuneration, on the ground that they were only called upon in rotation with their fellow-citizens to discharge a public duty in the administration of justice, it is but right that the bankers, merchants, and other higher classes of commercial men, should also render their service to the state on the same terms, and, like the common jurymen, be exempt from attendance, except in due rotation; and as it would be natural, of course, that men who are held in general esteem for their integrity and intelligence would be selected more frequently than others, it is but proper, therefore, that they should be at liberty to decline serving the office more frequently than belongs to their share of obligation.

Another alteration, upon which our readers will probably not be so unanimous in their approval, is the discharge of the jury after twelve hours' deliberation; the verdict of nine being held sufficient. It was a great evil to confine the jury for an indefinite period; and no doubt, in many instances, it had the effect of inducing the weak to surrender their conscience to the disposal of the strong. There might, however, be great danger of haste and injustice, if a bare majority were sufficient to determine the question at issue; but, guarded as the commissioners recommend, we think the plan may be safely tried. It appears that no less than the unanimity of the whole twelve will be accepted, until the expiration of twelve hours; and then, instead of a bare majority, three fourths in number are required to concur. This prudential course we highly approve, and wish it were equally manifested in all our measures of law reform.

The abolition of *technical quibbles* on misjoinder of the forms of, and the parties to, an action, and the expense of recommencing the proceedings on the death of any one of the litigants, must be hailed on all hands as a wise measure on the part of the profession, and a just one towards the public.

Our readers may also be congratulated on the alterations proposed in regard to the *misnomer* of parties, which frequently occasioned great trouble and annoyance to the practitioner, and the expense of amending which, and the delay incident to it, were always reluctantly borne by the suitor. Where the Christian name is not known, the defendant may be sued by such initial letters or abbreviations as he uses in his signature, and the appearance must be entered in the right name. This, we believe, is consistent with the established practice in the Courts of Scotland; and certainly it was high time that the "fencing with justice," which so long received the sanction of the Courts, should

* Vide p. 337, *antè*.
† Vide p. 328, *antè*.

be abolished. In the days of Alfred there might be no difficulty to ascertain each man's exact appellation; but the case is somewhat different now: our "sturdy ancestors" might need all the *essoigns*, appliances, and means to protect them from their baronial oppressors; but in these times the middle classes of the community are more interested than any other in the speedy administration of justice.

Amongst other improvements in regard to matters of practice, we may particularly notice the recommendation to establish a general rule for computing the times at which the various steps in a cause are to be taken. If it were not well known by the sad experience of most practitioners, it could scarcely be credited that the several Superior Courts had *different methods of computing time*,— one Court holding the first or last day inclusive, and another exclusive; and according as the Sunday was the last or an intermediate day, it was or was not reckoned. These divers modes of calculating also varied in different stages of the cause; so that it was not sufficient to know how the Courts generally counted the given number of days, but the practitioner was obliged to look to the particular rule at each step he took. All this is proposed to be set at rest by one simple uniform rule, namely, that the first day shall be exclusive, and the last inclusive, and that Sundays shall not be reckoned.

The general scope of the alterations is to diminish the amount hitherto expended in conducting actions at law; but there is one recommendation which will have the effect of increasing the costs. We allude to the intention of requiring *interlocutory judgment to be signed in debt*, and the damages assessed under a writ of inquiry as in other actions. This change was manifestly necessary for the purposes of justice. As the practice stands at present, a plaintiff may lay his action in debt, and for want of plea sign final judgment, and issue execution for such sum as he pleases. The abuse of this mischievous power was checked, of course, by the peril of future proceedings, and by the general fair dealing of the practitioners; but no such power ought to exist.

Having enabled our readers, in an *Appendix* containing the whole of the Report, to peruse the several details of the proposed regulations, which must be peculiarly important to every practitioner in the Common Law Courts, we refer them to its contents, and anticipate they will concur with us in thinking that the commissioners have added to their high reputation, both by the manner in which they have executed this part of their task, and the care and deliberation which they have bestowed on the subject.

NOTES ON THE NEW BANKRUPTCY COURT ACT.

The Bankrupt Act, 1 & 2 Wm. 4. c. 56. is now before us. It has received considerable amendments since it was last printed as a bill amended in committee, although that was as late as the 7th of the present month. In our next Number we intend to present to our readers a complete account of the new Court in all its parts.* We shall now merely notice the differences between the act and the bill, as it was last adverted to in our pages.

The two chief alterations are these: — As the bill stood in committee, all the commissioners of bankrupts appointed during the times of Lords Lyndhurst and Brougham, were excluded from compensation; and it is rather singular that, on the very last night of the debate in the House of Commons, the Attorney-General expressly took this distinction. However by the act (sect. 53.) *all* the commissioners of bankrupts are to have compensation from the Lords of the Treasury; it being provided, however, that the annual sum paid to them shall not exceed 200*l*., and shall not be paid to any commissioner who at the commencement of the act, or at any time afterwards, shall hold any public office or employment of an annual value greater than the annuity to be so certified as payable to him; or be in the receipt of any yearly sum of money in lieu of or as compensation for the proceeds of any such office or employment exceeding in amount such annuity.

The other important alteration is in the clause giving remuneration to the official assignees. The defects of this clause were exposed in our last Number, p. 386. As it stands in the act, they are to receive "such sums of money as shall appear to the commissioners, upon consideration of the amount of the bankrupt's property,

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* In the mean time our readers may consult a little publication which we have just seen, called "The New Bankrupt Act, with an Introduction, Notes, and Index, by a Barrister," which contains much useful information.

and the nature of the duties to be performed by such official assignee, to be just and reasonable."

We approve of both of these alterations. The exclusion of the commissioners last appointed from compensation would have been but a paltry and unjust saving. We think that the second clause of the proviso will shut out many of the seventy — and very properly — from the 200*l.* As to the remuneration of 5*l.* per cent. proposed by the bill to the official assignees, it must have been altered sooner or later, as it was evidently inserted through some strange and blundering inadvertence.

SITTINGS IN THE SUPERIOR COURTS.

MICHAELMAS TERM, 1831.

COURT OF EXCHEQUER.

Before Lord Lyndhurst.

IN TERM.

MIDDLESEX.		LONDON.	
Thursday	Nov. 10	Thursday	Nov. 17
*Monday	21	Thursday	24

AFTER TERM.

Saturday	Nov. 26	*Monday	Nov. 28

The Court will sit at eleven o'clock in Term and ten o'clock after Term.

No Special Juries will be tried in Term.

NOTES OF THE WEEK.

RECORDERSHIPS.

C. CRESSWELL, Esq., Barrister at Law, of the Northern Circuit, has been elected Recorder of Hull.

Clinton James Fynes Clinton, Esq., Barrister at Law, of the Midland Circuit, has been elected Recorder of the Borough of Newark, in the place of John Balguy, Esq., who resigned, after holding the office about twenty years.

Thomas Noon Talfourd, Esq., Barrister at Law, of the Oxford Circuit, has been elected Deputy Recorder of Banbury, on Thursday, the 20th inst.

OFFICIAL ASSIGNEES UNDER THE NEW BANKRUPTCY COURT ACT.

The Governor of the Bank, the Chairman of the East India Directors, Mr. John Martin, Mr. John Smith, Mr. George Norman, Mr. Lewis Loyd, and four Commissioners of Bankrupt, are said to be appointed by the Lord Chancellor to select proper persons as official assignees. — *Times.*

* When the Sittings are fixed for a Monday, the entry of causes closes at eight o'clock in the evening of the previous Friday.

SUPERIOR COURTS.

COURT OF KING'S BENCH.

HABEAS CORPUS. — PARENT AND CHILD.

The Court will grant a habeas corpus *at the instance of a father, to remove his child from the custody of the mother, although there is no suggestion that the child is subjected to any improper confinement or restraint, nothing being shown to prove that the custody of the father is improper.*

JERMY showed cause against a rule obtained by *V. Richards*, why a *habeas corpus* should not issue to bring up a female infant of tender years named Eliza M'Clellan, from the custody of its mother, in order to be placed under the care of a schoolmistress named by her father. The application was at the instance of the father. There was no suggestion in the affidavits on which the rule had been obtained, that the child was subjected to any improper restraint or confinement. The present application was made under the 56 Geo. 3. c. 100. § 1., which was an extension of the 31 Car. 2. The principle of that statute was to give jurisdiction to the Courts to relieve the subject from a state of illegal and improper restraint. The Court, therefore, has only authority to interfere in those cases, where it shall appear that the party whom it is sought to release is in a state of illegal and improper restraint. I do not mean to deny that the father is entitled to the legal custody of his child. If it shall appear that the party is subjected to illegal and improper restraint, the Court will relieve; and if the party has not legal discretion, the Court will then determine what custody is most safe, in which he should remain. This is the principle to be deduced from all the cases. In the case of *R.* v. *Sir Francis Blake Delaval and others*, 3 Burr. 1434., which was an application for a *habeas corpus* to be directed to him to produce *Ann Catley*, a girl of eighteen years of age, Lord *Mansfield* said, "In cases of writs of *habeas corpus* directed to private persons to bring up infants, the Court is bound *ex debito justitiæ* to set the infant free from an improper restraint; but they are not bound to deliver them over to any body, nor to give them any privilege. This must be left to their discretion, according to the circumstances that shall appear before them." That being the result of Lord *Mansfield*'s judgment on all the cases, if the Court shall see that there is no circumstance in this case to require the exercise of this discretion, to remove the child from its present custody, it will not be disposed to give it over into the care of the father. Mr. Justice *Blackstone*, in the third volume of his Commentaries, page 143., says, that "before the abolition of the tenures in chivalry, it was a doubt whether an

action would lie for taking and carrying away any other child besides the heir; some holding that it would not, upon the supposition that the only ground or cause of action was losing the value of the heir's marriage; and others holding that an action would lie for taking away any of the children, for that the parent hath an interest in them all, to provide for their education." For that proposition he cites *Cro. Eliz.* 770. Mr. Justice *Blackstone* then continues: "If, therefore, before the abolition of these tenures it was an injury to the father to take away the rest of his children, as well as his heir (as I am inclined to think it was), it still remains an injury, and is remediable by writ of ravishment." If your Lordship is satisfied in the first instance that this child is under no illegal or improper restraint, you will not interfere, although the father may have this right over his child, but will exercise your own discretion as to whether you will interfere or not. I have already observed, that no suggestion is made by the other side that the child is subjected by its mother to any improper restraint. In addition to this negative proof of the good conduct of the mother, I have the affidavit of *Dame Pullen*, in which she states that Mary M'Clellan, the mother of the child, has lived with her for a considerable time as her housekeeper; that the mode in which the mother came to have possession of the child was in consequence of its being afflicted with a scrofulous complaint while at a school at which the father had placed it; that, in consequence of that complaint, and the fact of two others of her children having died of it, she had taken the child from the school; that the child was in a very delicate state of health, and required very great care and attention; that the child had now been for some time under the mother's care at *Dame Pullen*'s house; and that, during the whole of that period, the treatment by the mother of her child was most kind and attentive. I hope that your Lordship will, under these circumstances, think it right that the child should not be delivered over into the care of the father. *Cur. adv. vult.*

Patteson J. I understand Mr. *Jeremy*'s argument against the restoration of the child to its father to be, first, on the ground that this Court does not interfere by *habeas corpus* to take an infant out of the custody of any one, unless something like force or improper restraint of the person exists; and secondly, under the peculiar circumstances of this case, the Court will not be disposed to interfere. As to the first ground, I think the authorities do not warrant the objection. The law is perfectly clear as to the right of the father to the possession of his legitimate children, of whatever age they may be. In the case of *R.* v. *De Manneville*, 5 East, 221., the Court held, that the father of a child is entitled to the custody of it, though an infant at the breast of its mother; if the Court see no ground to impute any motive to the father injurious to the health or liberty of such a child as by sending it out of the kingdom; the father being at the time an *alien enemy*, domiciled in this kingdom, and the mother being an *English woman*, and apprehensive only that he meant to send the child abroad, but assigning no sufficient reason for such an apprehension. With respect to the argument, that some force or improper restraint must be used, in order to authorise the Court in removing an infant from the custody of any one, the authorities referred to show that it is not necessary any force or restraint should exist on the part of the person having the custody of the infant, towards it; but there must be some force or improper restraint on the part of the father, in order to enable the Court to take it from him. It appears in the cases, that the Court of King's Bench has no authority to take the child from the father, unless it also seems that the child has some improper restraint put upon it. I do not mean to say, that the Court has any power in such a case. It is laid down in *Blissett*'s case, Lofft, 748., that the Court has a power to change the custody of the child, and to take it from the father. That is the strongest case to be found, as to the authority of this Court in similar instances. But that case was doubted a good deal by the Court of Common Pleas, in the case of *Ex parte Skinner*, an infant, 9 B. Moore, 278., in which case the Court doubted of its authority so to interfere. I do not mean to say that this Court has not authority so to do. It is not necessary to say to what extent that case is an authority. It is not pretended that the child was ill treated by the father; I am therefore left here to say, whether this Court can refuse to restore to the father the custody of his child, to which he has a general right, on the ground stated in these affidavits. The Court of Chancery has said, that the Court of King's Bench has an authority to restore a father to his rights; but that the Court of King's Bench has no power to compel a father to perform his duty. The Court of Chancery may exercise that power, but we cannot; we are bound to enforce the father's right. There is no instance of the King's Bench having taken the custody of the child from the father on the ground of improper instruction. It was the House of Lords (*Wellesley* v. *Wellesley*, 2 Bligh, 124.) who determined, that for the sake of the education of the child, they felt bound to take the custody of it from the father. But there they distinguished the right of the Lord Chancellor to interfere, from that of the Court of King's Bench. If there is any thing to show that the child will be improperly educated, an application may be made to the Court of Chancery.

Jeremy begged to call the attention of his Lordship to the case of *R.* v. *Middleton*, 1 Chit. Rep. 654., where a husband claimed the custody of his wife, and the Court refused to interfere.

Patteson J. That is a different thing. In that case, the Court said that they would leave the wife to go where she thought fit, because the husband has not such a right to the custody of his wife's person as the father has to that of his child. A wife may exercise some judgment and discretion, but a child cannot; and the Court will not interfere, where, as in the present case, there is nothing suggested which leads one to suppose that any ill usage has been exercised by the father, or the schoolmistress with whom he wishes his child to be placed. I feel myself, therefore, bound to say, that the child must be

delivered up to Miss ———, whom the father has named. It might be better, as the child is in a delicate state of health, that it should be with the mother; but we cannot make any order on that point.

Rule absolute.—*Ex parte M'Clellan.* T. T. June 9. 1831.

SECURITY FOR COSTS.

Where a defendant pleads after it has come to his knowledge that the plaintiff is abroad, the Court will not oblige the latter to give security for costs.

Barstow showed cause why all proceedings should not be stayed until the plaintiff had given security for costs. The application was founded on two grounds: first, that the plaintiff was residing abroad in America; and secondly, that the attorney bringing the action had no proper authority for that purpose from the plaintiff. It was an action of trespass, for entering the plaintiff's house and injuring his goods. The defendant had pleaded. With respect to the first ground, the defendant's attorney did not deny, that he knew the plaintiff was abroad at the time he pleaded; and it was sworn by the plaintiff's attorney that he must have been acquainted with the fact, for he had come to the office of the latter, and obtained the information that he was in America. It must, therefore, be taken that he knew the fact. Now, in *Duncan* v. *Stint*, 5 B. & A. 702., in which a similar application had been made, the Court said, "that when a cause is pending, a party, if he means to apply for security for costs, must take no step after he knows that the plaintiff is out of England; for a defendant ought not to wait until expense has been necessarily incurred, which must frequently be the case, particularly in actions of trespass and replevin." The first ground, therefore, failed entirely. Then as to the second, namely, that the attorney bringing the action had not sufficient authority for that purpose,—the attorney had received instructions from the plaintiff's wife. The plaintiff being absent from this country, his wife was not to be left defenceless; but the authority of the wife was sufficient, even against the consent of the husband. In the case of *Chambers* v. *Donaldson and others*, 9 East, 471., a *feme covert*, living apart from her husband under sentence of separation, with alimony allowed *pendente lite* in the Ecclesiastical Court, having brought trespass in the name of her husband against wrongdoers, for breaking and entering her house and taking her goods, the Court refused, on the application of such defendants, to stay the action, though supported by an affidavit of the husband (who had not released the action, nor applied to be indemnified against the risk of costs), that the action was brought without his authority. Now, here, there was no pretence for saying that the action was brought against the consent of the husband, or that he would repudiate the authority of the attorney.

But the warrant of attorney, Mr. Tidd, p. 95., laid it down, might be filed at any time before final judgment. So that at present there did not appear any reason for the application on the latter ground; on both points, he submitted that the rule must be discharged.

Creswell, in support of the rule, contended that this was the common case of a defendant applying for security for costs, where the plaintiff was out of the country; and that the facts of the case of *Duncan* v. *Stint* were different.

Patteson J. On the authority of *Duncan* v. *Stint*, where the Court laid it down, that "when a cause is pending, a party, if he means to apply for security for costs, must take no step after he knows that the plaintiff is out of England; for a defendant ought not to wait until expense has been necessarily incurred, which must frequently be the case in actions of trespass and replevin;" I think you are too late in your application. The rule must, therefore, be discharged.

Rule discharged. — *Brown* v. *Wright*. T. T. June 11. 1831.

ATTORNEY.— MORTGAGEE.

Where an attorney has received into his possession title deeds from a person to whom he has lent money, as a security for that money, and it appears that the owner of those deeds did not give authority so to bail them, the Court will not interfere to make the attorney deliver up the deeds.

White showed cause against a rule directed to two attorneys, requiring them to show cause why they should not deliver up certain title deeds belonging to a Miss *Keene*. The circumstances under which the deeds had come into their possession were the following:—A Mr. *George Birt* borrowed a sum of 40*l.* from them, and deposited these deeds, which belonged to Miss *Keene*, with them, as a security. It was understood that the money was borrowed for Miss *Keene*. None of this money had ever since been paid. The money having been here lent on the security of these deeds, and no collusion between *Birt* and these gentlemen being suggested, there was no pretence for the present application. *In the matter of Samuel Lowe*, 8 East, 237., the Court refused to compel an attorney, upon a summary application, to deliver up, on payment of his demand, a lease put into his hands for the purpose of making an assignment of it; there being no cause in Court, nor any criminal conduct imputed to him in respect of it. In this case there was no cause in Court, nor was any criminal conduct imputed to these two gentlemen in respect of these deeds. The present rule, he submitted, must therefore be discharged.

Godson, in support of the rule, contended that it was gross negligence in the attorneys not to apply to Miss *Keene*, to know whether it was with her concurrence the deeds had been deposited by *Birt* with them.

Patteson J. This is a common case of borrowing money on the security of deeds. There is nothing wrong in the conduct of these gentlemen, and therefore the present rule must be discharged with costs.

Rule discharged with costs.—*Ex parte Keene.* T. T. June 9. 1831.

INDEMNITY.—LUNATIC.

Where a plaintiff has been delirious, and on apparently recovering, he brings an action against his bankers to recover money belonging to him in their hands, the Court will not oblige him to give an indemnity to the bankers, on payment by them to him, of the sum for which the action is brought.

Kelly showed cause against a rule to require the plaintiff to give an indemnity to the defendants, on payment by them to him of 6789*l.* The plaintiff is a gentleman of fortune, and the defendants are bankers. In the course of the last year the plaintiff was ill, and ultimately became delirious. He has, however, since recovered, and is now quite well. The defendants, who are his bankers, have refused to pay over to him any money, on the ground that he has been delirious. They have now made this application, for an indemnity on payment of this sum of money over to the plaintiff. This is an unprecedented application. If they choose, they may pay the money into Court.

Starkie, in support of the rule. The only objects which these gentlemen have in making this application, is to save the expense of paying the money into Court, and to protect themselves. For they have been advised by high authority, that if they were to pay it over to this gentleman, and, on a writ *de lunatico inquirendo*, he should be found lunatic, they will be liable again.

Patteson J. This is like a case of an action brought by a party who had committed an act of bankruptcy. There, the Court would not relieve the defendant.

Rule discharged.—*Hope* v. *Watson*. T. T. June 9. 1831.

ANSWERS TO QUERIES.

LETTERS OF ADMINISTRATION. P. 384.

THE letters of administration granted to *C. D.* were void (Com. Dig. Administration, B. 10.); and payment to him is not sufficient to discharge the debtor from his liability to the executor. The money may be recovered back by the debtor, from *C. D.*, as money had and received to his use; or the executor may, instead of suing the debtor for the original debt, maintain *assumpsit* against *C. D.* for the money so paid to him; and declare in the common form for *money had and received*.—1 Salk. 27. J. B.

COMMENCEMENT OF ACTION.—TENDER. P. 368.

In answer to the Query of your correspondent Z., I have to observe that, if the plaintiff can prove that the writ was issued previously to the defendant having made his tender, he (the defendant) would be held liable to pay the expenses incurred, the same as if the process had actually been served upon him; but if, on the other hand, the plaintiff made the tender before the writ was issued, it would be valid, and the defendant would not be held liable for more than the actual writ; and the expenses of the writ would, in that case, fall wholly upon the plaintiff. H. B. A.

PAROCHIAL REGISTER. P. 384.

It would be highly satisfactory if J. H. would give some authority for his position, that "the *legal* sum for searching and taking extracts (a certificate) of christenings, marriages, and deaths, from parochial registers, is two shillings and sixpence." J. B.

ATTORNEY'S SIGNED BILL. P. 320.

I am of opinion, that proof of a letter having been posted in this country for North America, is not a sufficient compliance with the statute of 2 Geo. 2. c. 22. § 3. alluded to by your Querist.

I do not find, in looking over a multiplicity of Reports, the decision of any case similar to the present one.

It has been held sufficient, in cases where an attorney is ignorant of his client's residence, to leave the bill at his last known place of abode. *Vide* the case of *Wadeson* v. *Smith*, E. T. N. P. 1816, 1 Starkie, 324., which states: "The plaintiff, an attorney, having brought an action against the defendant for the amount of his fees, it appeared that he had delivered his bill at his client's last known place of abode, which induced the counsel for the defendant to contend that it was insufficient, under the 2 Geo. 2.; for, if the plaintiff had made proper enquiries when the bill was delivered, he would have ascertained where the defendant had removed to; but Lord *Ellenborough* C. J. said, that as the bill was delivered at the defendant's last known place of abode, he was of opinion that the statute was satisfied."

This is the only case I can find, which bears at all upon the subject; and although it differs very materially from the one in question, I am, nevertheless, inclined to think, that if ever the case comes before the Court, it will be sufficient evidence of the fact of a delivery to the party: the point, however, appears to me of considerable doubt.

In answer to the other Query of your correspondent, respecting the taxation of bills on appeal cases, I would observe, that it is not necessary that bills should be taxed before delivery. An action may be maintained without taxation having taken place; and it has been decided, that an attorney's bill may be taxed after action, and at any time before judgment, unless the money has been paid; *vide* 2 Petersdorff's Abr. p. 641.; but I would remind your correspondent, that if a client pays his attorney's bill, and then has it taxed, he cannot recover, by action, the difference between the original and the taxed amount. But from a MS. case, E. T. 1814, cited in Arch. Prac. K. B. 31., it would seem, that if it appear that the attorney has been overpaid, the Court will oblige him to refund the surplus. And also by the 2 Geo. 2. c. 23. it appears that if, upon taxation of the bill, it should be found that the attorney has been overpaid, he will be compelled to refund as much as the officer shall certify to

have been overpaid; and in default of his so doing, will be liable to an attachment or process of contempt. H. B. A.

DISCHARGING MORTGAGE. — USURY. P. 351.

In reply to H. B. A., I refer him to Mr. Coventry's notes on Powell on Mortgages, vol. ii. p. 934. a. sixth edition, where he will find the following paragraph: —

"In a late case it was proposed to pay off a mortgage bearing interest at five *per cent.* immediately. The mortgagee refused to take the principal money until after six months' notice, on the ground that if he then laid out his money in the funds, he could get no more than three *per cent.* The mortgagor, being very desirous of obtaining a re-conveyance of the legal estate for the purpose of effecting a family arrangement, then proposed, at the end of six months, to make up the deficiency of interest which the mortgagee might sustain by investing his money in the funds; to which the mortgagee assented, provided it could be done safely. On laying a case before counsel, he inclined to think that the acceptance of such deficiency would be usury, because the mortgagor, not having had the use of the money in the mean time, he would be paying more than five *per cent.* interest. It may indeed be said, that the surplus payment is not interest; and certainly it cannot be, as the money is not out in use: but if a mortgagee by *any means* takes more than principal, interest, and costs, it is usury; and this is a means by which more than principal and interest would be obtained; and it is conceived that the usury cannot be evaded by saying that the extra payment is for the purchase of a convenience."

Some short time back *A. B.*, a mortgagee, pressed *C. D.*, the mortgagor, for payment of the mortgage money, and it was agreed that *A. B.* should wait a short time, and that, when the mortgage was paid off, *A. B.* should receive, besides his principal and interest, six months' interest, in consideration of his forbearance, and in lieu of six months' notice. *A. B.*, however, got tired of waiting, and filed his bill of foreclosure, to which an answer was put in; and shortly after this *C. D.* was in a situation to pay off the mortgage, and applied so to do. *A. B.* charged in his account the principal, interest, and costs, and six months' interest in lieu of six months' notice; to which latter charge *C. D.* objected, on the ground of the proceedings which had been taken. *A. B.* however insisted, and *C. D.*, having the fear of the Master's Office before his eyes, allowed the business to be concluded on *A. B.*'s terms.

C. D. then, relying on the above note of Mr. Coventry's, advised with an eminent special pleader, whether *A. B.* had not rendered himself liable to the usury laws; and whether the six months' interest which had been paid to him could not be recovered back in an action? On which the following opinion was written: —

"I am of opinion that an action on the statutes of usury cannot be supported against *A. B.* The sum received by him cannot be considered as interest; nor, in my opinion, was the receipt of the same a shift or pretence to evade the statutes, so as to bring his case within the acts. It appears to me to have been an unfounded claim for half a year's payment in lieu of notice; but though the payment could not have been compelled by him, it was not, in my judgment, an usurious taking for the loan or forbearance of money. It may be very doubtful, also, at law, whether the sum in question can be recovered back by *C. D.* as money had and received to her use, the payment having been made with full knowledge of all the facts of the case, and ought therefore to have been resisted; and it has been decided that money paid with full knowledge of the facts, cannot be recovered back as having been paid under an ignorance of law. See the case of *Bilbee* v. *Lumly*, 2 East's Reports. *C. D.*'s remedy is in equity; though the sum is so small, the remedy is not worth pursuing."

The opinion of an eminent King's counsel was then taken, and the following is a copy of it: —

"This is not a case of usury. There can be no usury except upon an agreement to receive more than legal interest for the forbearance of money. Here there was no such agreement, and the forbearance of money was not the consideration for the payment of the sum in question.

"Nor do I think that the money can be recovered back, as it was paid voluntarily; *A. B.* contending (whether rightly or wrongfully is now immaterial), that he was entitled to half a year's interest instead of half a year's notice. The question whether the filing of the bill destroyed his claim, cannot be agitated after the payment of the money and the execution of the deeds." T.

QUERIES.

MORTGAGE TRANSFER DUTY.

WHAT is the proper stamp to be used on a transfer of mortgage for the sum of 400*l.*, with a further advance of the sum of 100*l.*, under the 3 Geo. 4. c. 117. § 2.? Will it be 3*l.* 5*s.*, viz., 1*l.* 15*s.* in respect of the transfer, and 1*l.* 10*s.*, the *ad valorem* upon the 100*l.*? Should this be the case, and the deed be more than one skin, would the second and third skins be 1*l.* or 1*l.* 5*s.*, the duty on the first skin being composed both of a deed and *ad valorem* stamp?

In a transfer of a mortgage of copyhold premises for the same sums, would the same duty as on freehold be required, or only 1*l.* for the transfer, that being the duty payable under the 55 Geo. 3. on a mere transfer?

J. H. L.

REPAIRS.

Supposing windows in a house, occupied by a tenant from year to year, to be broken by the throwing of a stone from an unknown person, is the landlord or tenant to be at the expense of re-glazing? and if the former refuse to pay or allow for it, can the tenant legally deduct the charge he is put to from the next quarter's rent he has to pay his landlord?

G. G.

MISCELLANEA.

ANTIQUITY OF JUDGES.

HERBERT, in his history of the English law, informs us, that "the first persons to whom our Saxon kings committed the general trust of administering justice universally under them, were Ailwin[a], the pious founder of Ramsey Abbey, then called Alderman of all England; Fosti[b] Earl of Northumberland; and Harold[c], son to Goodwin Earl of Kent. After the Norman conquest, the principal Judge was termed *capitalis Justicia*, or *Justiciarius Angliæ*, of which rank were Odo Bishop of Bayeux, and William Fitzosborn; and it is not improbable but that Lanfrank Archbishop of Canterbury, Goisfride Bishop of Constance, and Robert of Morton, had jointly the administration of the same office during some part of the Conqueror's reign; for it appears[d] that several precepts were directed to them from that king which imply as much. Richard Basset and Alberic de Vere, by a special precept[e] from Henry I., were likewise invested with similar powers."

Diceto, a canon of St. Paul's, in his Annals of King Henry II., says, "The Bishops of Ely, Winchester, and Norwich, were constituted Chief Justices of England in 1179, the very year that Richard de Lucie, quitting that great office, took the habit of a canon regular in the Abbey of Lesnes, of his own foundation."

The last person that held the office of *Justiciarius Angliæ*, says Herbert, "was Philip Basset, constituted in the 45 Henry III.—the King's Bench and Common Pleas having afterwards each a presiding Judge, who held the office of the Chief Justice there." Basset received, in order to enable him to support his office with great dignity, a pension of one thousand marks, which was granted[f] to him out of the king's exchequer by even portions, as did likewise his predecessor Hugh Bigod.[g]

OFFICE OF LORD CHANCELLOR, AND COMPARATIVE NUMBER OF SUITS AT DIFFERENT PERIODS.

We extract the following summary account of the nature of the office of Lord Chancellor from the Life of Sir Thomas More, by Sir James Mackintosh, which, as the author observes, may perhaps prevent some confusion respecting it among those who know it only in its present state.

"The office of Chancellor was known to all the European governments, who borrowed it, like many other institutions, from the usage of the vanquished Romans. In those of England and France, which most resembled each other, and whose history is most familiar and most interesting to us, the Chancellor, whose office had been a conspicuous dignity under the lower empire, was originally a secretary who derived a great part of his consequence from the trust of holding the king's seal, the substitute for subscription under illiterate monarchs, and the stamp of legal authority in more cultivated times. From his constant access to the king, he acquired every where some authority in the cases which were the frequent subject of complaint to the Crown. In France, he became a minister of state with a peculiar superintendence over Courts of justice, and some remains of a special jurisdiction, which continued till the downfall of the French monarchy. In the English Chancellor were gradually united the characters of a legal magistrate and a political adviser; and since that time the office has been confined to lawyers in eminent practice. He has been presumed to have a due reverence for the law, as well as a familiar acquaintance with it, and his presence and weight in the counsels of a free commonwealth have been regarded as links which bind the state to the law.

"One of the earliest branches of the Chancellor's duties seems, by slow degrees, to have enlarged his jurisdiction to the extent which it reached in modern times. From the Chancery issued those writs which first put the machinery of law in motion in every case where legal redress existed. In that Court new writs were framed, when it was fit to adapt the proceedings to the circumstances of a new case. When a case arose in which it appeared that the course and order of the common law could hardly be adapted, by any variation in the forms of procedure, to the demands of justice, the complaint was laid, by the Chancellor, before the king, who commanded it to be considered in council; a practice which, by degrees, led to a reference to that magistrate himself. To facilitate an equitable determination in such complaints, the writ was devised called the writ of *subpœna*, commanding the person complained of to appear before the Chancellor, and to answer the complaint. The essential words of a petition for this writ, which in process of time has become of so great importance, were in the reign of Richard III. as follows: 'Please it therefore, your Lordship,—considering that your orator has no remedy by course of the common law,—to grant a writ *subpœna*, commanding T. Coke to appear in Chancery, at a certain day, and upon a certain pain to be limited by you, and then to do what by this Court shall be thought reasonable and according to conscience.' The form was not materially different in the earliest instances, which appear to have occurred from 1380 to 1400. It appears that this device was not first employed to enforce the observance of the duties of trustees who held lands, as has been hitherto supposed, but for cases of an extremely different nature, where the failure of justice in the ordinary Courts might ensue, not from any defect in the common law, but from the power of turbulent barons, who, in their acts of outrage and lawless violence, bade defiance to all ordinary jurisdiction. In some of the earliest cases we find a statement of the age and poverty of the complainant, and of the power, and even learning, of the supposed wrong-doer;

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[a] H. Hunt. Hist. lib. iv. Fani Angl. p. 128, 129. [b] Ibid. [c] Ibid.

[d] Regist. de Ely. in Bibl. Cotton., sub effigie Titi, a. 1. f. 25.

[e] Ex ipso autogr. in Bibl. Cotton.

[f] Rot. Liberat. 40 Hen. 3. m. 3.

[g] Liberat. 44 Hen. 3. m. 7.

topics addressed to compassion, or at most to equity in a very loose and popular sense of the word, which throw light on the original nature of this high jurisdiction. It is apparent, from the earliest cases in the reign of Richard II., that the occasional relief proceeding from mixed feelings of pity and of regard to substantial justice, not effectually aided by law, or overpowered by tyrannical violence, had then grown into a regular system, and was subject to rules resembling those of legal jurisdiction. At first sight it may appear difficult to conceive how ecclesiastics could have moulded into a regular form this anomalous branch of jurisprudence. But many of the ecclesiastical order, originally the only lawyers, were eminently skilled in the civil and canon law, which had attained an order and precision unknown to the digests of barbarous usages then attempted in France and England. The ecclesiastical Chancellors introduced into their Court a course of proceeding very similar to that adopted by other European nations, who all owned the authority of the canon law, and were enlightened by the wisdom of the Roman code."

The proceedings in Chancery, lately recovered from oblivion, show the system to have been in regular activity about a century and a half before the Chancellorship of Sir Thomas More, the first common lawyer who held the Great Seal since the Chancellor had laid any foundations (known to us) of his equitable jurisdiction. The course of education, and even of negotiation in that age, conferred on More, who was the most distinguished of the practisers of the common law, the learning and ability of a civilian and a canonist. In his administration, from the 25th of October, 1529, to the 16th of May, 1532, 400 bills and answers are still preserved, which afford an average of about 160 suits annually. Though this average may by no means adequately represent the whole occupations of a Court which had many other duties to perform, it supplies us with some means of comparing the extent of its business under him with the number of similar proceedings in succeeding times. The whole amount of bills and answers in the reign of James I. was 32,000. How far the number may have differed at different parts of that reign, the unarranged state of the records does not yet enable us to ascertain. But supposing it, by a rough estimate, to have continued the same, the annual average of bills and answers during the four years of Lord Bacon's administration was 1461, being an increase of nearly tenfold in somewhat less than a century. Though causes connected with the progress of the jurisdiction and the character of the Chancellor must have contributed to this remarkable increase, yet it must be ascribed principally to the extraordinary impulse given to daring enterprise and national wealth by the splendid administration of Elizabeth, which multiplied alike the occasions of litigation and the means of carrying it on. In a century and a half after, when equitable jurisdiction was completed in its foundations and most necessary parts by Lord Chancellor Nottingham, the whole number of equity suits was about 15,000, which yields an average of 1650 to every year of his Chancellorship.

Under Lord Hardwicke, the Chancellor of most profound celebrity, the yearly average of bills and answers appears to have been about 2000; probably in part because more questions had been finally determined, and partly also because the delays were so aggravated by the multiplicity of business, that parties aggrieved chose rather to submit to wrong than to be ruined in pursuit of right. This last mischief arose in a great measure from the variety of affairs added to the original duties of a Chancellor, of which the principal were bankruptcy and parliamentary appeals. Both these causes continued to act with increasing force; so that, in spite of a vast increase of the property and dealings of the kingdom, the average number of bills and answers was considerably less from 1800 to 1809 than it had been from 1745 to 1754.

It must not be supposed that men trained in any system of jurisprudence, as the ecclesiastical Chancellors, could have been indifferent to the inconvenience and vexation which necessarily harass the holders of a merely arbitrary power. Not having a law, they were a law unto themselves; and every Chancellor who contributed by a determination to establish a principle, became instrumental in circumscribing the power of his successor. Selden is, indeed, represented to have said, that equity is according to the conscience of him who is Chancellor; which is as uncertain as if we made the Chancellor's foot the standard for the measure which we call a foot. But this was spoken in the looseness of table-talk, and under the influence of the prejudices then prevalent among common lawyers against equitable jurisdiction. Still, perhaps, in his time, what he said might be true enough, for a smart saying. But in process of time a system of rules was established, which has constantly tended to limit the originally discretionary powers of the Chancery. *Equity*, in the acceptation in which that word is used in English jurisprudence, is no longer to be confounded with that *moral equity* which generally corrects the unjust operation of law, and with which it seems to have been synonymous in the days of Selden and Bacon. It is a part of law formed from usages and determinations, which sometimes differs from what is called common law in its subjects, but chiefly varies from it in its modes and of proof, of trial, and of relief; it is a jurisdiction so irregularly formed, and often so little dependent on general principles, that it can hardly be defined or made intelligible otherwise than by a minute enumeration of the matters cognisable by it.

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